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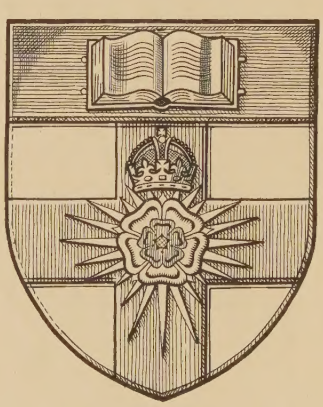

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THE

LAW REPORTS.

529 V

Probate Division.

IN THE COURTS OF PROBATE AND DIVORCE

REPORTED BY

ROBERT A. PRITCHARD, D.C.L., ADVOCATE;

IN THE ADMIRALTY AND ECCLESIASTICAL COURTS

BY

GAINSFORD BRUCE, BARRISTER-AT-LAW;

IN THE PRIVY COUNCIL

BY

HERBERT COWELL, BARRISTER-AT-LAW;

AND

IN THE COURT OF APPEAL

BY

MARTIN WARE AND H. CADMAN JONES,
BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

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OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

XLIII VICTORIA.

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OF

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

XLIII VICTORIA.

[IN THE COURT OF APPEAL.]

1879
Nov. 8.

THE STOOMVAARTS MAATSCHAPPY NEDERLAND *v.* OWNERS OF THE "KHEDIVE."

[1878 N. 162.]

THE KHEDIVE.

Practice—Appeal—Staying Proceedings pending Appeal to House of Lords—Jurisdiction of Court of Appeal—Rules of Court, Order LVIII., r. 5.

An application to stay proceedings under an order of the Court of Appeal, pending an appeal to the House of Lords, must be made to the Court of Appeal, and not to the Division of the High Court to which the action is attached.

THE action in this case was brought by a Dutch company called the Stoomvaarts Maatschappy Nederland, the owners of the ship *Voorwaarts*, against the owners of the ship *Khedive*, claiming damages for a collision between the two ships in the Straits of

5 29

1879

THE KHEDIVE.

Malacca. The defendants put in a counter-claim for damages done to their own ship. The action was tried before the Admiralty Judge on the 20th of February, 1879, when his Lordship decided that both vessels were to blame, and ordered the damages to be divided equally between the plaintiffs and defendants.

An appeal was brought from this decree, and was heard on the 28th of July, 1879, when the Court of Appeal reversed the judgment of the Court of Admiralty, and held that the collision was occasioned solely by the fault of the plaintiffs' ship, and condemned the plaintiffs in damages, which were referred to the registrar to be assessed. The plaintiffs proposed to appeal from this judgment to the House of Lords.

The plaintiffs then applied to the Admiralty Judge for an order suspending the proceedings under the decree pending the appeal to the House of Lords. His Lordship, however, having doubts as to his jurisdiction to make the order, desired that the application should be made to the Court of Appeal.

W. Phillimore, for the application. The plaintiffs ask for the usual order, but the question does not appear to be settled as to the court in which the order ought to be made. In *Justice* v. *Mersey Steel and Iron Co.* (1) it was held that such an application must be made to the Divisional Court.

[THESIGER, L.J. That decision was made before the passing of the Appellate Jurisdiction Act, 1876, when the old practice of bail in error remained.]

In *Grant* v. *Banque Franco-Egyptienne* (2) and *Morgan* v. *Elford* (3) similar orders were made by the Court of Appeal, but *Justice* v. *Mersey Steel and Iron Co.* (1) was not cited in those cases.

Clarkson, for the defendants, said he would not oppose the order if the Court had jurisdiction to make it.

JAMES, L.J. I am of opinion that the Court has jurisdiction to make the order. This Court is the proper Court to which to apply to suspend any order which this Court has made. The order will be that, on the plaintiffs undertaking to present a petition of appeal to the House of Lords within a month, the

(1) 1 C. P. D. 575. (2) 3 C. P. D. 202
(3) 4 Ch. D. 352, 388.

proceedings to assess damages be stayed pending the appeal; and if the defendants tax and enforce payment of the costs, their solicitor is to give an undertaking to repay them in case the decree should be reversed in the House of Lords. The applicants must pay the costs of this application.

1879

THE KHEDIVE.

BAGGALLAY and THESIGER, L.JJ., concurred.

Application granted.

Solicitors for plaintiffs: *Clarkson & Greenwell.*
Solicitors for defendants: *Freshfield & Williams.*

THE CITY OF MANCHESTER. (1878 O. 372.)

May 20.

Damage—Practice—Action by Owners of Cargo—Both Vessels to blame—Costs.

An action of damage was instituted, on behalf of the owners of cargo laden on board a vessel which had been sunk in a collision with another vessel, against such other vessel, and the Court pronounced that both vessels were to blame for the collision:—

Held, that the defendants must be condemned in the costs of the action.

THIS was an action of damage instituted on behalf of the owners of the cargo laden on board the *Moselle* against the *City of Manchester*. The two vessels had come into collision, and the *Moselle*, with the plaintiff's cargo on board, had sunk by reason of the collision. At the hearing of the action the Court pronounced both vessels to blame for the collision, and reserved all questions of costs.

W. Phillimore, on behalf of the plaintiffs, moved the judge in court to order the owners of the *City of Manchester* to pay the costs of the action. The practice with regard to costs in actions of damage instituted on behalf of owners of cargo cannot be considered as settled. It is true that in the case of *The Hibernia* (1) no costs were given on either side; but it does not appear from the report of the case that the order was made after argument; whilst in *The Milan* (2) the judgment of the Court, as

(1) 2 Asp. Mar. Law Cas. 454.

(2) Lush. 388.

1879

CITY OF MANCHESTER.

reported, is quite silent as to costs. In the recent case of *The Malta* (1) this Court, in the absence of any other precedent than the case of *The Hibernia* (2), followed the course pursued in that case, and ordered that both parties to the action should bear their own costs.

[SIR ROBERT PHILLIMORE. Since the case of *The Malta* was decided the registrar has referred to the papers in the case of *The Milan* (3), and has found that in that case the costs of the action were given to the plaintiffs.]

The rule that in actions of damage by cargo-owners where both ships are to blame the defendants must bear the costs of the action is the only correct rule to adopt. [He referred to *The Condor*. (4)]

E. C. Clarkson, for the defendants. The ordinary rule of practice in actions of damage brought by shipowners is that, if the Court decides that the vessels which came into collision were both to blame, the parties to the actions must bear their own costs. Why should a different rule of practice as to costs be adopted in cases where the plaintiff in the action is the owner of cargo laden on board one of the wrong-doing ships? The same principles as to the liability of the parties to the action in damages have been decided to be applicable whether the plaintiff in the action is the owner of the ship or the owner of the cargo: *The Milan* (3); *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (5)

SIR ROBERT PHILLIMORE. Considerable obscurity seems to hang over the decision in these cases with regard to costs; but I shall adhere to the precedent which the registrar assures me was made in the case of *The Milan* (3): that is to say, that the plaintiffs are entitled to their costs.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Gellatly, Son, & Warton.*

(1) 1877. O. No. 317, not reported.
(2) 2 Asp. Mar. Law Cas. 454.
(3) Lush. 388.
(4) 4 P. D. 115.
(5) Law Rep. 10 Ex. 47.

THE PASITHEA. (1879 K. 82.)

1879
May 23.

Salvage—Practice—Two Actions against the same Property—Costs.

In a case where the defendants, in two actions of salvage instituted against the same property, were ordered to pay only one set of costs, to be apportioned between the plaintiffs in the two actions, the Court directed that the apportionment should be made according to the amounts of the plaintiffs' respective bills of costs.

Two separate actions of salvage were instituted against the *Pasithea*, one by the owners, master, and crew of the smack *Prince of Wales*, and the other by the owner, master, and crew of the steam-tug *Harwich;* an application to consolidate the actions was made before hearing, and, the plaintiffs objecting to the consolidation, no order was made. The action was now heard.

Butt, Q.C., and *W. Phillimore*, appeared for the owner, master, and crew of the *Harwich*.

Nelson, for the owners, master, and crew of the *Prince of Wales*.

E. C. Clarkson and *Cottingham*, for the defendants, the owners of the *Pasithea*.

The judge awarded 50*l*. to the owners, master, and crew of the *Prince of Wales*, and 600*l*. to the owner, master, and crew of the *Harwich*, and ordered that the defendants should only pay one set of costs, to be apportioned between the plaintiffs according to the amounts of their respective bills of costs, observing that the apportionment of the costs according to the amounts of the taxed costs of the plaintiffs, as directed in the case of *The Sarah* (1) had been found to be inconvenient in practice.

Solicitors for the *Harwich*: *Tatham & Co.*
Solicitors for the *Prince of Wales*: *Lowless & Co.*
Solicitors for defendants: *Stocken & Jupp.*

(1) 3 P. D. 39, at p. 42.

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July 1.

THE EMPUSA. (1878 C. 297.)

Limitation of Liability—Costs—Claim in respect of a Loan on Security of Freight—Merchant Shipping Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.

Although the plaintiff in an action for limitation of liability is ordinarily liable to pay the costs of the action, yet, if the defendants raise unnecessary issues on which they fail, he is entitled to the costs of those issues, and he will not be ordered to pay the costs occasioned by a dispute between rival claimants to the the proceeds in court.

The master of the ship *C.*, bound from Philadelphia to Antwerp, obtained at Philadelphia from M. a loan of money on freight upon the security of an instrument signed by him, by which it was stipulated that the loan should be repaid after arrival of the *C.* at Antwerp or other intermediate port at which the voyage should end, and that if there should be no payment of freight the loan should not be paid back.

The *C.*, whilst on the course of her voyage to Antwerp, came into collision with another ship and sank, and her cargo was lost. The collision was occasioned by the negligence of those in charge of the other ship, and her owners instituted an action for limitation of their liability. In such action a sum of money was awarded out of the proceeds paid into court to the owners of the *C.* for loss of freight. M. claimed a portion of this sum in respect of his loan :—

Held, that his claim was well founded.

Semble, where in an action for limitation of liability a sum of money is awarded as compensation for loss of freight to the owners of a vessel run down by the plaintiff's ship, the holder of a bottomry bond on the freight of the vessel run down is entitled to claim, in respect of the loan on bottomry, a portion of the sum awarded for loss of freight.

On the 26th of September, 1878, the British steamship *Empusa* came into collision with the ship *Commerce* in the English channel off Hastings. In consequence of the collision, the *Commerce* was sunk and her cargo was lost or damaged, and two of her crew were drowned. The owners of the *Empusa* instituted a suit for limitation of liability. The statement of claim stated that the collision was caused by the negligence of those on board the *Empusa*, and occurred without the actual fault or privity of the plaintiffs, that the sum of 8*l.* per ton, calculated on the gross tonnage of the *Empusa*, amounted to 8805*l.*, and that the plaintiffs were ready to bring that sum, together with interest thereon from the date of the collision, into court, and such further sum in respect of the loss of the lives of the two men who were drowned, as the Court might direct.

The owners of the *Commerce* and the owners of her cargo entered separate appearances and delivered separate statements of defence. The statement of defence delivered by the owners of the *Commerce* alleged that the master of the *Empusa*, who was one of the plaintiffs, was on board at the time of the collision and that the plaintiffs neglected to provide a proper and efficient crew for the *Empusa*, and that the collision was caused or contributed to by their neglect, and happened with the actual fault or privity of the plaintiffs respectively. The statement of defence delivered on behalf of the owners of the cargo stated that the owners of the cargo did not admit that the collision occurred without the actual fault or privity of the plaintiffs, and submitted that while the claims for loss of life remained unsettled the plaintiffs were not entitled to judgment, unless they paid into court or gave bail for the full amount of 15*l.* per ton on the gross tonnage of the *Empusa*.

On the 11th of January, 1879, the action came on for hearing, and witnesses were examined vivâ voce.

Webster, Q.C., and *Myburgh*, for the plaintiffs.

Milward, Q.C., and *E. C. Clarkson*, for the owners of the *Commerce*.

Stubbs, for the owners of the cargo of the *Commerce*.

Witnesses were examined on behalf of the plaintiffs to establish that the master of the *Empusa* was below at the time of the collision, and that the vessel was properly manned.

SIR ROBERT PHILLIMORE. The only question before me in this case is as to the applicability of the 54th section of the Merchant Shipping Act, 1862, that is to say, whether it is shewn to the Court that there was any actual fault or privity on the part of the owners of the *Empusa*. The exposition of the law contained in the case of *The Obey* (1) appears to me to be directly in favour of the plaintiffs. I must therefore reject the defence.

No doubt, as a general rule, the plaintiffs in an action for limitation of liability are liable to pay the costs of the proceedings, but in this case the defendants, the owners of the *Commerce*, have raised special issues which have rendered it necessary that the plaintiffs

(1) Law Rep. 1 A. & E. 102.

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should call witnesses, and these issues have been decided against the defendants, and I cannot do justice without giving to the plaintiffs the extra costs occasioned by those special issues. The plaintiffs will be entitled to a decree of limitation of liability on the usual terms, on payment into court of the amount of 8*l.* per ton of the tonnage of the *Empusa*, together with interest, and the costs of the action other than the costs occasioned by the issues unnecessarily raised by the defendants, and on giving bail for or paying into court the sum of 1000*l.* in respect of the claims for loss of life, and also undertaking to pay into court any additional sum for which they may hereafter be pronounced liable in respect of such claims.

In pursuance of this decision, the owners of the *Empusa*, on the 14th of February, brought into court the sum of 8940*l.* 13*s.* 8*d.*, and on the 20th of February the further sum of 1000*l.*

The usual reference then took place, and the registrar made his report. In his report he disallowed a claim made on behalf of the Cassa Marittima of Genoa, and questions having arisen between the Cassa Marittima and the owners of the *Commerce* with reference to this claim, the judge, on hearing counsel for the owners of the *Commerce* and the Cassa Marittima, ordered the facts relative to such questions to be stated in a special case. The following case was stated accordingly :—

On the 24th day of August, 1878, Elijah Nickerson, master of the British ship *Commerce*, then lying in the port of Philadelphia, requested from the agent of the Cassa Marittima of Genoa a loan of 598*l.* 1*s.* 4*d.* upon the security of the freight of the said ship to be earned on a voyage from Philadelphia to Antwerp.

The said loan was granted, and the said Elijah Nickerson signed the following instrument.

"Fifteen days after arrival at the port of Antwerp or other intermediate port at which shall end the voyage of my vessel denominated the ship *Commerce*, I promise to pay to the order of the Cassa Marittima of Genoa the sum of five hundred and ninety-eight pounds one shilling and fourpence sterling, value received as loan on freight for the last expenses necessary to the undertaking of the voyage from Philadelphia to Antwerp, Belgium, on the conditions of the regulations of the Cassa Marittima, of which I have received a copy, ship and freight being in accordance with such regulations liable for repayment with priority over every other credit."

On the back of this instrument were printed the regulations of the said Cassa Marittima, a copy of the same is annexed hereto and is to form part of this case.

The sum of 598*l.* 1*s.* 4*d.* secured by the said bill was not actually advanced in full by the Cassa Marittima to the said master, but such sum was and is the aggregate amount of the actual advance made by the Cassa Marittima to the said master, and the premium and interest on such actual advances which premium was retained by the Cassa Marittima pursuant to regulation 13 of the said regulations.

The said loan was duly made, and the *Commerce* sailed in due course on her destined voyage from Philadelphia to Antwerp, but on the 26th day of September, while off Hastings, in the English Channel, the *Commerce* was run into and sunk by the steamship *Empusa*, and with her cargo and freight was totally lost.

The plaintiffs, who are owners of the steamship *Empusa*, admitted their liability for the damages occasioned by the said collision, and brought this suit to limit such liability in the manner provided by the statute in that behalf, and obtained a decree therein on payment into Court of the amount of their statutory liability, and all claims in respect of the loss or damage occasioned by the said collision were referred to the registrar and merchants to report thereon.

Amongst other claims, the defendants, the owners of the *Commerce*, claimed the sum of 2148*l.* 13*s.* 6*d.* as damages for the loss of the freight to be earned by the said ship on the said voyage from Philadelphia to Antwerp, and were allowed the sum of 2088*l* in respect of such freight, being the amount of such freight less the expenses of completing the voyage.

The Cassa Marittima of Genoa also claimed the sum of 598*l.* 1*s.* 4*d.* as the damages they had sustained by reason of the loss of the freight, which was pledged to them as security for the said advance, and their claim was disallowed by the registrar on the ground, among others, that the owner of the ship was the only person who could recover in respect of the freight, and that the Cassa Marittima were not entitled to claim in competition with the owners of the *Commerce*, that vessel having been lost.

The Cassa Marittima of Genoa contend that they are entitled to prove for the loss of the freight so far as it was pledged to them, and that the defendants are not entitled to recover as part of their damages the freight which would have to be paid to the Cassa Marittima if the *Commerce* had arrived at Antwerp, and that, the said freight having been allowed by the registrar as part of the claim of defendants, the owners of the *Commerce*, such owners ought to hold and receive the same as trustees for the Cassa Marittima, and are under an obligation to pay a proportion thereof to the said Cassa Marittima, or to allow the Cassa Marittima to receive the same out of Court.

The questions for the opinion of the Court are:—First. Whether the Cassa Marittima, as against the owners of the *Commerce*, are entitled to prove against the fund paid into Court by the plaintiffs for the said sum of 598*l.* 1*s.* 4*d.* as damages occasioned in respect of the said collision.

Second. Whether, if the Cassa Marittima are not entitled to prove for the said sum as damages against the fund paid into Court by the plaintiffs, they are entitled as against the defendants, the owners of the *Commerce*, to receive payment of the said sum out of Court, or to an order that the said defendants, out of the moneys recovered by them as damages in respect of the loss of the said freight, should pay to the said Cassa Marittima the said sum for which the freight was pledged.

Third. Or, in the alternative, that the Cassa Marittima are entitled to receive

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out of the fund in Court applicable to the payment of damages for loss of freight, or from the defendants, the owners of the *Commerce*, the same proportions of the sum of 598*l.* 1*s.* 4*d.* as the total sum apportioned in respect of the loss of freight bears to the whole freight of the said ship.

CASSA MARITTIMA, GENOA.

Rules for Loans on Freight. (1)

The loans which the Cassa Marittima agree to make on freight must be subject to the following rules:—

1. Any owner desirous to obtain a loan on freight from the Cassa Marittima must make his request in accordance with the printed form which will be given him for the purpose.

3. The loan can never exceed a third of the whole freight the vessel may make.

4. The owner or the captain before he can obtain a loan must produce the bills of lading signed by the shipper in proof of not having received any previous advances on the freight.

5. The loan must be repaid within fifteen days after the arrival of the ship in the port to which she is bound, or wherever the voyage may terminate, and the vessel and freight will be liable to the repayment of the loan with priority over every other credit.

6. In the event of the vessel on arrival at the port of destination being ordered by the shipper of the cargo to any other port, the amount of the loan must be repaid to the agents of the Cassa Marittima, and a further loan may be asked, which the agents have power to grant or decline.

9. A receipt will be given by the captain or owner when the loan is made, signed in accordance with the above rules, or with any others that may be established.

11. Loans shall always be made in gold, and shall be repaid in gold, at the current rate of exchange on London at the port where the vessel discharges, or to the Cassa Marittima in Genoa.

12. Loans shall always be exempt from any contribution to either general or particular average.

13. The premium and interest on the sums granted in loan on freight according to the list must be always retained on the loan itself, and in case of a total loss, if there be no payment of freight, either total or partial, the sums received as loan shall not be paid back, except that which has been taken beyond the third part of the freight.

15. The owner or captain shall not take any other advances upon the same freight at the port of loading, or in such case hold themselves bound to return the present loan, even though the vessel be lost.

16. The captain shall give immediate notice on arrival at the port of discharge to the Cassa Marittima in Genoa, or to their agents at the nearest port, incurring otherwise the penalty of 10 per cent. on the amount of the loan.

May 31. The special case came on for argument.

Myburgh, for the Cassa Marittima. It is not necessary, in order

(1) Only such of the rules as are material are set out.

to support the claim now made, to contend that the claim could be enforced in an action of bottomry against the *Commerce* or her master. The bond operates as an assignment of freight, and when, as in the present case, there is a fund in court representing freight, the Cassa Marittima, as the assignees of freight, are entitled to claim on the fund. Moreover, if the Cassa Marittima cannot enforce the bottomry bond, it is the wrongful act of the *Empusa* that has disabled them, just in the same sense as the wrongful act of the *Empusa* has prevented the *Commerce* earning her freight, and both claims ought to be dealt with on the same principles. [He referred to the *The Dante.* (2)]

[SIR ROBERT PHILLIMORE. I think there is no doubt that the loan was a loan on bottomry.]

E. C. Clarkson, for the owners of the *Commerce.* No doubt the instrument signed by the master of the *Commerce* was an instrument of bottomry, and was subject to maritime risk. It is expressly stipulated on the face of the instrument that the repayment of the loan should be made after the arrival of the *Commerce* at Antwerp or any intermediate port. It would be contrary to all the principles by which the contract of bottomry has been considered to be governed to hold that, although this risk has gone against the bondholder, yet the amount lent should still be paid back. Not only has there been no arrival of the *Commerce* at any port at all, but it is by no means certain that, even if no collision had occurred, the voyage would have been completed in safety. Any damage which the Cassa Marittima can be said to have sustained by the collision must therefore be too remote to give a right to any share of the fund in court. The master of the *Commerce* would scarcely have paid a bottomry premium, or, what is the same thing, have allowed it to be retained on the loan, if he had contemplated that the Cassa Marittima were not to run the risk of his vessel being lost by sea perils.

Myburgh, in reply.

SIR ROBERT PHILLIMORE. This is a case for which there is no legal precedent, but it is one that is to be decided on general principles of equity; and I decide that the Cassa Marittima is

(1) 2 Wm. Rob. 427.

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entitled to receive out of the fund in court applicable to the payment of damages for loss of freight the same proportion of the 598*l.* 1*s.* 4*d.* as the total sum apportioned in respect of the loss of freight bears to the whole freight of the ship. The actual apportionment will be made by the registrar.

In pursuance of this decision the following order, omitting immaterial parts, was drawn up in the registry :—

The judge having heard counsel on both sides on the special case filed herein, pronounced that the Cassa Marittima was entitled to 181*l.* 6*s.* 7*d.* out of the amount reported by the registrar as recoverable in respect of the total freight of the vessel *Commerce*, and he directed the costs relating to the said special case to be costs in the action.

July 1. *W. Phillimore*, on behalf of the owners of the *Empusa*, moved the Court to vary so much of the order drawn up in pursuance of the above-mentioned decision as condemned the owners of the *Empusa* in the costs of and incident to the special case, on the ground that such costs were extra costs over which the owners of the *Empusa* had had no control, and which had been merely incurred for the purpose of settling a dispute confined to claimants on the fund in court. The owners of the *Empusa* were no parties to the special case stated as to the claim of the Cassa Marittima, and had no notice that costs would be asked for against them. They admit that by the practice of this Court and that of the Chancery Division, they will have to pay the costs of the action, but by the costs of the action must be understood only the costs of obtaining the decree of limitation of liability, and the ordinary expenses of the distribution of the fund in court, such as the expense of the usual advertisements, &c. To use the language of the Court in the case of the *African Steamship Co.* v. *Swanzy* (1), the owners of the wrong-doing vessel are not liable to bear the expense of "adverse litigation occasioning costs over which the plaintiffs have no control." The case of the *African Steamship Co.* v. *Swanzy* (1) has been recently followed by this Court in the case of *The City of Buenos Ayres.* (2)

Myburgh, for the Cassa Marittima of Genoa. None of the costs of and incident to the special case were improperly incurred ;

(1) 25 L. J. (Ch.) 870. (2) 1 Asp. Mar. Law Cases, 169.

they were all occasioned by the wrongful act of the *Empusa*, and it was for the Court to say in its discretion by whom they should be borne. The Court has exercised its decision rightly.

E. C. Clarkson, for the owners of the *Commerce*.

SIR ROBERT PHILLIMORE. On consideration I have come to the conclusion that the order I made on a former occasion, condemning the owners of the *Empusa* in the costs of and incident to the special case, was wrong, and I must therefore rescind it. In these actions of limitations of liability it is sometimes difficult to draw a line of demarcation with respect to what costs may be and what costs may not be considered as costs for which the owners of the wrong-doing vessel are to be rendered liable. On the whole, however, and looking at all the circumstances, I am satisfied that this is not a case in which I ought to saddle the owners of the *Empusa*, though they are the plaintiffs in the limitation of liability suit, with the extra costs of determining the points of law which have been raised between the owners of the *Commerce* and the Cassa Marittima as to the loan on freight. Indeed, if I were to do so, I do not think my decision could be brought within any established principle. I must, therefore, rescind that part of my former order which relates to costs. The order I shall make instead of the part thus rescinded will be that the Cassa Marittima and the owners of the *Commerce* will each bear their own costs of and incident to the special case.

Solicitors for the Cassa Marittima: *Cooper & Co.*

Solicitors for owners of the *Commerce: Clarkson, Son, & Greenwell.*

Solicitors for owners of the *Empusa : Lowless & Co.*

1879
July 18.

THE MARY. (1879 O. 166.)

Damage—Liability of Tug for negligent Navigation where the Vessel in tow is in charge of a Pilot by compulsion of Law—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 388.

Where a steam-tug towing a vessel under a towage contract is so negligently navigated as to come into collision with a vessel belonging to third parties. the owners of the steam-tug are liable for the damage done, even if at the time of the collision the vessel in tow was in charge of a duly licensed pilot by compulsion of law whose default solely occasioned the collision.

THIS was an action of damage brought by the owners of the steam-tug *Sussex* against the barque *Mary*, to recover the damages sustained in a collision between the two vessels on the 30th of April last. At the time of the collision, which happened in Sea Reach in the river Thames, the *Sussex* and another tug called the *Rambler* were proceeding up the river towing the *Desdemona*, a large sailing ship of 1400 tons register, and the *Mary* was working down on the starboard tack. There was on board the *Desdemona* a duly licensed Trinity pilot, who was in charge of her by compulsion of law.

The statement of claim, after setting forth the circumstances in which according to the case of the plaintiffs the collision had occurred, attributed the collision solely to the neglect and default of those on board the *Mary*.

The 5th, 6th, 7th, and 8th paragraphs of the statement of defence were so far as is material in substance as follows .—

5. Those on board the *Desdemona* and the tugs failed to keep a good look out.

6. Those on board the *Desdemona* and the tugs, and in particular those on board the *Sussex*, neglected or omitted to take proper measures in due time to keep clear of the *Mary*.

7. Those on board the *Desdemona* and the tugs, and in particular those on board the *Sussex*, starboarded their helms at an improper time.

8. Those on board the tugs, and in particular those on board the *Sussex*, wrongfully neglected or omitted to slacken speed when approaching the *Mary*.

The defendants by way of counter-claim repeated the allegations in the statement of defence, and alleged that the *Mary* had suffered damage by the collision.

A reply was delivered on behalf of the plaintiffs containing, inter alia, the following paragraphs :—

The plaintiffs further, in reply to the said counter-claim, say that if and so far as the said collision was occasioned by any neglect or default on the part of the *Desdemona* or of the said tugs, it was occasioned solely by some fault or incapacity of a pilot in charge of the *Desdemona* and of the said tugs, who was a qualified pilot within a district where the employment of such pilot is compulsory by law, and not by any negligence on the part of the plaintiffs or their servants.

The plaintiffs further, in reply to the said counter-claim, say that the said tugs were employed by the *Desdemona* and were under the orders of those on board the *Desdemona*, and that the allegations in the said counter-claim, charging the *Desdemona* and the *Rambler* with having caused or contributed to the said collision, are immaterial and irrelevant.

The action was heard on the 10th and 11th of June last, together with an action of damage (1879 B., No. 171) brought by the owners of the *Desdemona* against the *Mary* to recover the damages the *Desdemona* had sustained by reason of the *Sussex* having been driven against her in consequence of the same collision.

After hearing the evidence of witnesses called on behalf of the owners of the *Sussex*, the owners of the *Desdemona* and the owners of the *Mary*, the Court came to the conclusion that the *Sussex* had not made proper endeavours in time to get out of the way of the *Mary*, and that no blame whatever attached to the *Mary*, and consequently dismissed the *Mary* from both suits against her with costs, and pronounced that the *Sussex* was solely to blame for the collision.

On the application of counsel, the Court directed that the questions of law and fact raised on the pleadings, as to the liability of the owners of the *Sussex* in respect of the damages claimed by the owners of the *Mary* by way of counter-claim, should be reserved.

July 8. The questions of law and fact reserved were argued.

Butt, Q.C., and *W. Phillimore*, for the defendants.

E. C. Clarkson, for the plaintiffs.

The authorities cited in argument are referred to in the judgment.

Cur. adv. vult.

July 18. SIR ROBERT PHILLIMORE. In this case the steam-tug *Sussex* has been found alone to blame for the collision with the

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barque *Mary*. It is now contended that the *Sussex*, the wrongdoer, is exempt from responsibility to the injured ship upon the ground that the *Desdemona*, the ship which the *Sussex*, in conjunction with another tug, was towing, had a pilot on board by compulsion of law. To this defence two answers have been made: (1.) That the immunity of the ship towed does not extend to the tug; (2.) that it is not proved by trustworthy evidence that the collision was solely occasioned by the fault or incapacity of the pilot acting in charge of the ship, and therefore that the 388th section of the Merchant Shipping Act, 1854, does not apply to this case.

First, as to the question of law, to use the language of Dr. Lushington in *The Protector* (1): "But the great principle that a wrongdoer is responsible to the injured party, saving in the excepted cases, continues unaltered." The burden of proof lies upon the party claiming the exemption. It is necessary to bear in mind the distinct relations subsisting between the ship and her tug and the ship and her pilot. Perhaps a close attention to this distinction will remove the difficulty which the language of some of the earlier reported cases on this subject is supposed to have created.

The root of the exemption in the case of compulsory pilotage is that the pilot is not the servant of the owner of the towed ship, but a person forced upon him by the statute; but the relation of the owner of the ship to the tug is very different. The tug is his servant voluntarily taken and employed by him for the occasion. The law implies, when the tug is employed, a contract between the owner or master of the tug and the owner of the ship to the effect that the tug will obey the directions of the ship-owner and act as his servant; but this contract does not affect third parties, and the principle which exonerates the ship in the case of the pilot does not apply to the tug.

It has been said, indeed, in various cases, that the tug and the vessel she has in tow are to be regarded as one vessel, but this rule has only been laid down for the purpose of rendering a ship in tow subject to the rules of navigation applicable to steamers; in that sense only can they be treated as one vessel. The master

(1) 1 W. Rob. 45, at p. 57.

of the tug has a separate contract and a separate responsibility from the pilot. In one sentence, it is by the exercise of free will that the ship takes the tug; by compulsion of law that she takes the pilot.

It has been contended, however, that my predecessor, Dr. Lushington, ruled in the case of *The Duke of Sussex* (1) that the exemption of compulsory pilotage extended to the tug, but I think that a careful examination of this case does not lead to that conclusion; the case was decided in 1841, when the 55th section of the 6 Geo. 4, c. 125, was in force, which did not contain the words "compulsory by law." The case is reported in the first volume of William Robinson's Reports, p. 270, and much more fully and accurately in the first volume of the Notes of Cases, p. 161; and it appears that Dr. Lushington, following a decision of the Court of Exchequer, decided that if the pilot was taken on board, whether by compulsion or not, the owner of the ship was exonerated from responsibility. Dr. Lushington seems to have been much impressed by the mischievous consequences which would follow from holding that the tug was not as much under the control of the pilot as the tow, and the chief object of his judgment seems to have been to refute the contrary opinion. He appears to have had the same object in the subsequent decision in *The Christina* (2), delivered in 1848.

Looking to all the circumstances of this decision, I am of opinion that the case of the *Duke of Sussex* does not furnish a precedent for the case now before me; and I am fortified in this opinion by a subsequent decision of the same learned judge in *The Ticonderoga* (3), in the year 1857. In that case Dr. Lushington said (at p. 216):—

> I take the true meaning of the plea to be that the *Ticonderoga* was in the service of the French Government; that the steamer was attached to her, and she was compelled, by the order of the government, to employ her in all the proper duties which could attach to a steamer. . . . The blame having been imputed to the steamer, let us consider whether the *Ticonderoga* can or can not be made responsible for the damage which has been done. Now, that the steamer was engaged in the service of the *Ticonderoga*, and that the steamer took the *Ticonderoga* into

(1) 1 W. Rob. 270. (2) 3 W. Rob. 27.
(3) Swa. 215.

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mischief, there can be no doubt whatever. We must recollect that this is a proceeding in rem. . . . Let us see what cases there are in which the Court does not hold a vessel responsible for the damage done; there is one case, and one only, that I am aware of, and that is where a pilot is taken on board by compulsion. On what principle is the owner in that case relieved from paying the damage done? On the principle of compulsion. The principle that the man is not the servant of the owner, but is forced upon him by Act of Parliament. Was this steamer taken by compulsion, or was it not? What species of compulsion is it which is averred on behalf of this American vessel that is to relieve her from the responsibility which the maritime law of the world attaches to the wrongdoer? Entering into a stipulation with the French Government. It is impossible to contend that because a person has entered into a voluntary contract by which he is finally led into mischief, that that can relieve him from making good the damage which he has done.

Upon the whole, I am of opinion that the *Sussex* is not exonerated from the consequences of her wrongful act by reason of the *Desdemona* having on board a pilot by compulsion of law.

Having expressed my opinion on the question of law, it is perhaps necessary to deal with the question of fact, but I think it right to state that my recollection of the opinion of the Trinity Masters, as well as a re-perusal of the evidence, leads me to the conclusion that the damage was, as a matter of fact, occasioned not solely by the fault or incapacity of the pilot, but that the master of the ship and the tugs were, as Sir John Nicholl said in *The Girolamo* (1), in pari delicto; and that I do not think there is any trustworthy evidence that the pilot's orders were obeyed.

Upon both grounds of law and fact I pronounce judgment in favour of *The Mary*.

Solicitors for owners of the *Sussex*: *Lowless & Co.*
Solicitors for owners of the *Desdemona*: *Mercer & Mercer.*
Solicitors for owners of the *Mary*: *Cooper & Co.*

(1) 3 Hagg. 169, at p. 176.

MARSHALL *v.* MARSHALL.

1879
Jan. 28.

Restitution of Conjugal Rights—Injunction—Stay of Proceedings.

In a suit for restitution of conjugal rights, the respondent moved for an injunction and stay of proceedings, upon affidavit shewing that the petitioner was bound by deed not to institute such a suit:—

Held, that such a defence must be alleged by plea, and afforded no ground for a summary dismissal of the suit.

Upon such defence being subsequently alleged by plea:—

Held, that it was such an equitable plea as the Divorce Court since the Judicature Acts is bound to consider:—

Held, also, that a wife is bound by a deed of separation, containing a covenant not to sue her husband for restitution of conjugal rights. Suit instituted by her in violation of such a covenant dismissed.

6 P.D. 99

THE petitioner, Caroline Marshall, prayed for a restitution of conjugal rights, alleging her marriage on the 25th of February, 1858, and separation by the husband, without cause, on the 8th of June following. The respondent filed an affidavit alleging that the separation was by the desire of the petitioner, and that a deed of separation was executed on the 8th of June, 1858, in accordance with the provisions of which the parties had ever since lived separate.

Inderwick, Q.C. (*Bayford*, with him), moved the Court for an injunction to restrain the petitioner from further prosecuting her suit, on the ground that she was bound by the deed of separation.

Pritchard, for the petitioner.

SIR J. HANNEN. My jurisdiction is given by the 5th sub-section of s. 24 of the Judicature Act of 1873, and is in these terms: "No cause or any proceeding at any time pending in the High Courts of Justice . . . . shall be restrained by prohibition or injunction." How, then, can I restrain these proceedings by injunction? And the sub-section further provides as follows:— "But every matter of equity, on which an injunction against the prosecution of any such cause or proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence." It

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is obvious therefore that the deed should be alleged by way of defence.

Motion refused.

On a subsequent day *Inderwick*, Q.C. (*Bayford*, with him), moved for a stay of proceedings. They relied upon the other words of the sub-section above referred to and *Dawkins* v. *Weimar*. (1)

Pritchard, for the petitioner, was not called upon.

SIR J. HANNEN. This is not a case in which I ought, in my discretion, to order a stay of proceedings, as there is a very substantial question to be argued, and one which should be put upon the record, so that it may be carried if necessary before another Court. The statute clearly contemplates this by providing: "That every matter of equity on which an injunction might have been obtained may be relied on by way of defence." The statute does not prevent the Court from ordering a stay of proceedings when it is necessary for a temporary purpose, but it was not intended that, while injunction eo nomine was abolished, the Court might do the same thing in another form.

There being no ground for staying proceedings temporarily, and the object being to obtain a permanent stay of proceedings, the question must be raised by plea.

Motion refused.

The respondent thereupon filed an answer in accordance with his affidavit, and the petitioner replied taking issue upon the answer, and further alleging that there was no consideration for the deed. The respondent joined issue, and the cause was set down for hearing when the question whether the wife was bound by the deed was argued.

The facts did not justify a contention that there was no consideration for the deed.

Inderwick, Q.C., and *Bayford*, for the respondent, referred to *Hunt* v. *Hunt* (2), and the cases there quoted.

Pritchard, for the petitioner, admitted that the question was concluded by *Hunt* v. *Hunt* (2) as to a husband suing for restitution

(1) 1 Q. B. D. 499.

(2) 31 Beav. 89; S. C. on appeal, 4 De G. F. & J. 221.

of conjugal rights after having bound himself by deed not to do so, but argued that neither the authorities nor reasoning applied to such a covenant entered into by trustees on behalf of a wife: *Hunt* v. *Hunt*. (1)

Cur. adv. vult.

SIR JAMES HANNEN. This is a suit by a wife for restitution of conjugal rights.

The husband sets up by way of defence that he has lived separate and apart from the petitioner, in accordance with the provisions of a deed of separation, entered into between him and her and certain other persons as trustees on her behalf, on the 8th of June, 1858.

To this the petitioner has replied, that there was no consideration for the said deed of separation.

The respondent alleges that there was such consideration.

At the hearing the petitioner's counsel contended, that even if there were a consideration for the deed, it did not afford a sufficient answer to the suit.

This raises the important question whether an agreement by deed to live separate is a bar to a suit for restitution of conjugal rights.

This question comes before the Court under essentially different conditions to those which existed with reference to it before the passing of the Judicature Acts. The Divorce Court is now a part of the High Court of Justice, and though its practice remains unchanged, it is bound, like the other divisions, to administer law and equity according to the rules contained in the 24th section of the Judicature Act of 1873, amongst others the 5th Rule, that "No cause or proceeding at any time pending in the High Court of Justice shall be restrained by prohibition or injunction, but matter of equity, on which an injunction against the prosecution of any such cause or proceeding might have been obtained if this Act had not passed, either unconditionally, or on any terms or conditions, may be relied on by way of defence."

The question, therefore, which is now raised for my determination is no longer whether the respondent's defence would have been good in the Court for Divorce and Matrimonial Causes, but

(1) 31 Beav. 89; S. C. on appeal, 4 De G. F. & J. 221.

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whether a court of equity would have restrained the petitioner from proceeding in this suit. If it would, the respondent's plea is a valid defence.

It appeared in evidence that the petitioner and respondent were married in February, 1858; that differences having arisen between them, the petitioner insisted, in March of the same year, on living apart from her husband, and a deed of separation was executed on the 8th of June, 1858, whereby, in consideration of the covenants entered into by the trustees of the wife, the respondent covenanted with them: "That it shall be lawful for his wife to live apart from him, and that he would not sue her in the Divorce Court for so doing, or for the purpose of compelling her to live with him; and, further, that certain specified real and personal estate which the petitioner might be entitled to then or in expectancy under a will recited in the said deed, and also all other the estate and effects, real and personal, which the petitioner should by purchase, gift, devise, or bequest in her favour, or by representation, or by any business which she might carry on, or by savings out of her respective income or estate, or by any other means, or in any other manner, during her coverture become entitled, should be and remain to and for her sole and separate use;" with full power of disposal of such property by her by will or otherwise. And in consideration of the covenant by the respondent, the trustees of the petitioner covenanted "That she should not at any time thereafter molest or disturb her husband, or require by any means whatsoever, either by ecclesiastical censures, or by taking out any citation, or by process, or by commencing or instituting any suit whatsoever, or in any other manner endeavour to compel him to cohabit or live with her, or to any restitution of conjugal rights, nor require, or by any means whatsoever, endeavour to compel her husband to allow her any further or greater or other alimony or maintenance than what had been relinquished or given up by him as thereinbefore mentioned; and, further, that the said trustees covenanted to indemnify the respondent against all losses, &c., in consequence of the acts of his wife, past or future."

The petitioner was a party to the deed, and executed it.

The passages above cited sufficiently establish that there was ample consideration for the deed. Apart from the reciprocal

covenant, the renunciation by the husband of his rights in his wife's property constituted a valuable consideration sufficient to support the engagements entered into with him, and the fact alleged at the hearing that the income has been small which the wife for twenty years has received from it cannot affect the validity of the instrument.

There has been considerable fluctuation of opinion as to the extent to which voluntary engagements of married persons to live separate should be recognised by the courts of law. The earlier cases on the subject are all collected and commented on in a learned note to Roper on Husband and Wife, vol. ii. p. 270, 2nd ed. But since the decision of the House of Lords in *Wilson* v. *Wilson* (1) it can no longer be contended that there is anything illegal or contrary to public policy in an agreement between married persons that no suit for restitution of conjugal rights shall be instituted by either of them. For my own part, I must say that the opinion I have formed, after several years' experience in the administration of the law in this Court, is that it is in the highest degree desirable, for the preservation of the peace and reputation of families, that such agreements should be encouraged rather than that the parties should be forced to expose their matrimonial differences in a court of justice. And I must further observe that so far are suits for restitution of conjugal rights from being in truth and in fact what theoretically they purport to be, proceedings for the purpose of insisting on the fulfilment of the obligation of married persons to live together, I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand.

The legality of a covenant not to sue for restitution of conjugal rights being clear, the next question is whether a court of equity would enforce it by injunction restraining its breach. It appears to me that this question, also, is now concluded by authority binding upon me. In the case of *Hunt* v. *Hunt* (2), on appeal from the late Master of the Rolls, Lord Westbury, L.C., held that a covenant by a husband not to sue for restitution of conjugal rights could be enforced by a court of equity, by restraining the husband from

(1) 1 H. L. C. 538.

(2) 31 Beav. 89; S. C. on appeal, 4 De G. F. & J. 221.

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proceeding in a suit in the Divorce Court. It is true that in *Hunt* v. *Hunt* (1) the husband was restrained, and not the wife, but the question whether a wife could be so restrained was raised in that case, and the supposed immunity of the wife from injunction against prosecuting such a suit as the present was allowed by the Master of the Rolls, and formed one of the grounds of his judgment. It is clear, however, that the Lord Chancellor did not adopt this view, and considered that the case of *Hill* v. *Turner* (2) was an authority establishing that a court of equity had jurisdiction to grant an injunction against a feme covert to restrain her from suing in the Ecclesiastical Court for restitution of conjugal rights. The observation of the late Master of the Rolls on the case of *Hill* v. *Turner* (2) that the Lord Chancellor there intended to confine his interference to a question of property does not appear to me well founded. If he had so intended, he might have limited his decree to restraining enforcement of any claim to alimony, instead of which he added to the injunction for that purpose an injunction against the wife proceeding for restitution of conjugal rights. Considering, therefore, that I am bound by the decision of Lord Westbury in *Hunt* v. *Hunt* (1), I hold that the respondent's answer is sufficient. The suit will be accordingly dismissed.

Judgment for the respondent.

Solicitors for petitioner: *Langley & Gibbon.*
Solicitors for respondent: *Mackeson, Taylor, & Arnould.*

May 2.

HUTLEY AND ANOTHER *v.* GRIMSTONE AND ANOTHER.

Pleading—Undue Influence—Party propounding last Will—Right to begin.

In a testamentary suit the party propounding the last will is entitled to begin. So also is a party who alleges only undue influence, in opposition to the validity of a will.

THE plaintiffs propounded a draft of a will, dated the 19th of June, 1867, of Stephen Hutley, who died on the 13th of November, 1877. The defendants alleged that that will had been revoked by a will dated the 27th of January, 1872, which they propounded; and the plaintiffs, in their reply, alleged that the will propounded

(1) 31 Beav. 89; S. C. on appeal, 4 De G. F. & J. 221. (2) 1 Atk. Rep. 515.

S. Jun. MS. 45 85

by the defendants had not been duly executed, and that the deceased was not, at the time of its execution, of sound mind, memory, and understanding. Upon these pleadings the defendants claimed the right to begin.

Dr. Deane, Q.C., Serjt. Ballantine, Dr. Swabey, and *W. Ballantine,* were counsel for the plaintiffs.

Inderwick, Q.C., and *Jeune,* for the defendants.

SIR J. HANNEN. I had occasion yesterday (1) to deal with a portion of this subject, and I then held that it lies upon the party who pleads the affirmative issues impeaching a will to begin, for though there would be some proof of the will necessary beyond that raised by the issues, yet the parties have not by the pleadings required the proof, and it is only needed by the Court.

This, however, raises a somewhat different question, because here I understand the defendants allege that all other wills, of course including that of 1867, were revoked by what they say was the last will of January, 1872.

As far as my experience extends, it has been the practice of the Court to grant the right to begin to the person propounding the last will; and it is based upon reasons of convenience, which the Court is entitled and bound to consider. A testator often executes numerous wills, and the Court might be engaged in investigating the validity of a series, all of which would be of no importance whatever if the last will were established to be the true will; if the inquiry begins at any other point in the series, much time and labour might be thrown away, and it might be still necessary to investigate the last will. For these reasons I think the defendants are entitled to begin.

Solicitor for plaintiffs: *A. G. Ditton.*

Solicitors for defendants: *Paterson, Snow, & Bloxham.*

(1) The case referred to was that of *Keays* v. *Adams and Another,* in which the plaintiff, as executor, propounded a will dated the 21st of December, 1877, and two codicils, dated respectively the 5th of March, and the 12th of April, 1878, and the defendants pleaded only that the codicils were procured by undue influence.

Serjt. Parry and *Bayford,* were counsel for the plaintiff, and

Hy. Matthews, Q.C., Inderwick, Q.C., Waddy, Q.C., and *Searle,* for the defendants.

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July 25.

BETTS AND ANOTHER *v.* DOUGHTY AND OTHERS, AND DOUGHTY AND OTHERS, INTERVENING.

Will—Testatrix prevented by Force and Threats from altering it—Amendment of Pleadings.

M. A. D., the testatrix, in 1853 made her will, by which she gave her property equally between the plaintiffs, defendants, and interveners. In an action by the plaintiffs propounding this will, it appeared that in 1874 she gave instructions for another will, which would have deprived the plaintiffs of all interest in her estate.

In the course of the plaintiff's case some evidence was given tending to shew that the testatrix was prevented by force and threats from executing the proposed will.

The Court allowed the pleadings to be amended by adding statements to that effect, and praying for a declaration that the plaintiffs held their shares as trustees for the defendants and interveners.

THE plaintiffs propounded a will dated the 14th day of July, 1853, of Mary Ann Doughty, who died on the 6th day of December, 1878. The defendants alleged that the will was not duly executed, that the deceased was not of sound mind, memory, and understanding, that the will was procured by undue influence, and that the deceased did not know and approve of the contents. The will left the property, in the events which had happened, equally between the plaintiffs who were children of her sister and the defendants, and interveners, who were respectively children of two of her brothers. The interveners by their statement of claim supported the will.

In 1874, the deceased had given instructions for a will by which she divided her property equally between the defendants and the interveners, excluding the plaintiffs altogether. The draft of this proposed will had been approved by the deceased, who was at that time residing with the plaintiffs and remained with them until her death.

The action came on for hearing before a special jury, and in the course of the plaintiffs' case it appeared that the clerk of the solicitor who prepared the proposed will, attended with it at the house of the plaintiffs, for the purpose of getting it executed, but was not allowed to see the deceased; she was told by the plaintiffs that if she executed the will she could no longer reside in their house. She was then about eighty years of age.

Inderwick, Q.C. (*Witt*, with him), for the defendants, asked for leave to amend the statement of defence, by adding as follows:

6. That after the making of the said alleged will of the 14th day of July, 1853, the said deceased was prevented by the force and threats of the plaintiffs from executing a further will prepared by and under her instructions, whereby the plaintiffs would have been deprived of all interest under the said alleged will.

The defendants claim—

"That the Court will declare that the plaintiffs are trustees of the shares devolving on them by the said will of the 14th day of July, 1853, for the defendants and for the interveners."

Dr. Spinks (*Bayford*, with him), for the interveners, supported the application.

Sir H. James (*Pritchard* and *Frere*, with him), for the plaintiffs, contrà.

THE COURT allowed the amendment, and adjourned the hearing to enable the parties to produce further evidence for and against the facts alleged in the amendment.

The parties afterwards came to terms before the close of the adjournment, and no further evidence was therefore given, and the Court only pronounced for the validity of the will propounded by the plaintiffs.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendants: *White, Barrett, & Co.*
Solicitors for interveners: *Combe & Wainwright.*

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Nov. 25.

THE CITY OF MECCA. (1879 C. 275.)

Jurisdiction—Action in rem to enforce Judgment of Foreign Tribunal of Commerce.

The Admiralty Division has jurisdiction to entertain an action in rem to enforce a judgment obtained against a ship in a Tribunal of Commerce abroad.

THIS was an action in rem instituted on behalf of William Cotesworth and others of Lloyds, underwriters, and Besande & Co., of Lisbon, representatives of the *Empresa Insulana Navigação* of Lisbon against the steamship *City of Mecca*. The indorsement on the writ was in the following terms:—

The plaintiffs' claim is upon a judgment of the Tribunal of Commerce of Lisbon, by which the Court determined that the *City of Mecca* was alone to blame for a collision, and ordered the defendants to pay to the plaintiffs the loss sustained by them by reason of the said collision, and the plaintiffs claim 25,000*l*.

The writ in rem having issued, the solicitors for the plaintiffs applied in the registry for a warrant to arrest the ~~*Insulano*~~ *City of Mecca*, and in support of their application brought in an affidavit to lead warrant, which was in substance as follows:—

In the month of January, 1874, the steamship *Insulano* was run down and sunk off Cape Espichel, on the coast of Portugal, by the British steamship *City of Mecca*.

After the said collision the *City of Mecca* put into Lisbon, and proceedings were there instituted against the said steamship, which subsequently left Lisbon without giving security in the said proceedings.

The owners of the *City of Mecca* appeared to the said proceedings and contested the same, and the final Court of Appeal in Portugal affirmed a decree of the Tribunal of Commerce at Lisbon which determined that the *City of Mecca* was alone to blame for the said collision, and ordered the defendants, the owners of the *City of Mecca*, to pay to the plaintiffs the loss sustained by them by reason of the said collision.

No part of such damages, which amount to upwards of 25,000*l*., has been paid, and the *City of Mecca* is now within the jurisdiction of this Division of this Honourable Court, by reason whereof the aid and process thereof are required.

On the 1st of September in this year the *City of Mecca* was arrested in the action, and on a subsequent day her owners appeared in the suit, but under protest, and gave bail to answer

judgment in the action, and thereupon the *City of Mecca* was released.

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Butt, Q.C., and *E. C. Clarkson*, for the defendants under protest moved to set aside the writ and all subsequent proceedings, on the ground of the writ having been improperly issued. The action on a foreign judgment is founded on assumpsit *Williams* v. *Jones* (1); *Doglioni* v. *Crispin* (2); *Godard* v. *Gray* (3); *Schibsby* v. *Westenholz* (4); and a right of action founded on assumpsit cannot be enforced by proceedings in rem.

Webster, Q.C., *Sir Edmund Hornby*, and *G. Bruce*, for the plaintiffs. The judgment of the foreign court has established that facts exist which confer a maritime lien, and this Court has jurisdiction to enforce the lien. The Admiralty Division is the proper tribunal to enforce the judgment of a foreign Admiralty Court.

[In support of their argument they referred to the authorities noticed in the judgment, and to the following cases: *The Bold Buccleugh* (5), *Taylor* v. *Carryl* (6), and *The Young Mechanic.* (7)]

Butt, Q.C., in reply.

Cur. adv. vult.

Nov. 25. SIR ROBERT PHILLIMORE. This is a case in which the representatives of the Spanish ship *Insulano* have brought an action againt the steamship *City of Mecca*. In the writ of summons it is stated that [His Lordship read the indorsement on the writ.] In the affidavit to lead the warrant it is stated by Mr. Beard, clerk to the solicitors for the plaintiffs, that he is informed that after the said collision the *City of Mecca* put into Lisbon, and that proceedings were there instituted against the said steamship, which subsequently left Lisbon without giving security in the said proceedings; also, that the owners of the *City of Mecca* appeared to and contested the said proceedings, and the decree of the Tribunal of Commerce was confirmed by the final judgment of the Court of Appeal in Portugal.

A warrant of arrest was taken out in this court by the plaintiffs,

(1) 13 M. & W. 628, at p. 633.
(2) Law Rep. 1 H. L. 301.
(3) Law Rep. 6 Q. B. 139.
(4) Law Rep. 6 Q. B. 155.
(5) 7 Moo. P. C. C. 267.
(6) 20 How. 583.
(7) 2 Curt. 404.

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and the vessel has been released on bail. A motion has been made by the owners of the *City of Mecca* to set aside the writ of summons issued in this action and all subsequent proceedings on the part of the plaintiffs; also the bail bond executed on behalf of the defendants in this action; that the bail may be discharged, and that the plaintiffs be condemned in the costs of the action, on the ground of the writ having been improperly issued.

The question to be decided is whether this Court can and ought to enforce the sentence of a foreign admiralty court by a proceeding in rem. It appears to be expedient to make two preliminary observations. First, I express my opinion that whatever authority upon this subject was incident to the Court of Admiralty before the Judicature Act belongs to this Court now. Secondly, that this Court has always exercised a jurisdiction founded upon international comity with respect to the execution of the sentences of foreign admiralty courts. I proceed to consider the authorities on this subject in their chronological order, as it is important to shew that the duty of the Admiralty Court in England to enforce the decree of a foreign admiralty court has been steadily recognized for a great number of years.

The first authority I shall refer to is *Wier's Case*, in the King's Bench 5th of James I., A.D. 1608. (1) If a Frieslander sues an Englishman before the governor in Friesland and recovers a certain sum, and the Englishman, not having enough to pay for it, comes to England, whereupon the governor sends his "lettres missives" to England, asking all magistrates of that kingdom to cause execution of the said judgment: "Le judge del admiraltie poet executer cest judgment per imprisonment del partie et il ne serra deliver per le common ley; car ceo est per la ley de nations que la justice dun nation serra aidant al justice d'auter nation, et l'un de executer le judgment de l'auter; et la ley d'Engleterre prist notice de cest ley, et le judge del admiraltie est le proper magistrate pur cest purpose car il solment ad execution del ley civill deins cest relme." This case is referred to in Molloy de Jure Maritimo, vol. ii. p. 340. The next authority is that of Sir Leoline Jenkins, Judge of the High Court of Admiralty in the reign of Charles II. This authority is one to which very

(1) 1 Roll. Abr. 530; 6 Vin. Abr. 513; Court of Admiralty (B).

great weight has always been ascribed by Lord Stowell and other eminent civilians, as both witnessing to the practice of the courts administering the civil law and setting forth the principle upon which that practice was founded. Sir Leoline Jenkins, writing in A.D. 1666, says of the practice of civil law courts, that they ordinarily intermeddle not with nor inspect the merits of those sentences that are given without the limits of their jurisdiction. "It is a ruled case," he says, "that one judge must not refuse upon letters of request, to execute the sentence of another foreign judge when the persons or goods sentenced against are within his jurisdiction; and if he do, his superior must compel him to it, else it is a sufficient ground for reprisals against the territory": Wynne's Life, vol. ii. p. 762. The next authority is only four years later. It is the case of *Jurado* v. *Gregory* (1), in the King's Bench, 21 Charles II., A.D. 1670. In that case the plaintiff had sued in the English Admiralty Court for enforcement of a sentence given in a Spanish Admiralty Court. A prohibition was granted by the King's Bench, but only on the grounds that the sentence of the Spanish Court was not complete, but was only an award, and could not therefore be sued upon, and the original contract being one made on land, ought not to be sued upon in the admiralty. The following proposition was advanced in argument by Finch, the Solicitor General, and agreed to by the Court: "Where sentence is obtained in a foreign admiralty, one may libel for execution thereof here, because all the courts of admiralty in Europe are governed by the civil law, and are to be assistant one to another, though the matter were not originally determinable in our Court of Admiralty;" and *Wier's Case* (2) before referred to, was cited. The next authority occurs in the year 1704. It is the case of *Ewers* v. *Jones* (3) in which case Holt, C.J., in giving judgment, says:—

> The sentence of a civil law court in a foreign realm shall be executed in a court of the same nature here and proceeding after the same law; and no prohibition, because the temporal Courts proceed by a due law, and we must give credit to the sentence; as it was adjudged in the time of Charles II., between *Hughs* and *Cornelius*.

To these authorities may now be added a decision of the

(1) 1 Vent. 32.

(2) 1 Roll. Abr. 530; 6 Vin. Abr. 513.

(3) 2 Ld. Raym. 935.

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Supreme Court of the United States of America, in the case of *Penhallow* v. *Doane's Administrators*, decided in 1795. (1) In that case it was said by Mr. Justice Iredell, that it was clearly shewn at the Bar that a court of admiralty in one nation can carry into effect the determination of the court of admiralty of another; and Mr. Justice Cushing, observes "if courts of admiralty can carry into execution decrees of foreign Admiralties as seems to be settled law and usage."

Dr. Browne, in his Compendious View of Civil and Admiralty Law, a work dedicated to Lord Stowell, says (vol. ii. p. 120, ed. 1802): The last branch of Admiralty Jurisdiction I shall mention is the enforcing judgments of foreign courts. He then proceeds to cite the opinion of Sir Leoline Jenkins, which I have before referred to. I find that in the American work by Mr. Dunlap, entitled Admiralty Practice, p. 63, ed. 1850, it is stated that "a court of admiralty in one country can carry into effect the determination of a court of admiralty in another, as well as its own judgments." In Parson's Maritime Law, vol. ii. p. 541, also the work of an American writer of eminence, it is laid down that "admiralty courts in different countries sometimes enforce each other's decrees, or complete in one country what is done in another."

A consideration of these authorities, and the principle upon which they rest, leads me to the conclusion that it is the duty of one admiralty court, a duty arising from the international comity, to enforce the decree of another upon a subject over which the latter had jurisdiction. I do not think it necessary to enter into a consideration of all the cases decided by the Common Law Courts to the effect of foreign judgment in this country. The general principle of recognising and giving effect to such judgments is now admitted by these Courts. I did not indeed understand it to be denied by Mr. Butt that the Admiralty Court has power to execute the sentence of a foreign admiralty court. His objection is as to the mode by which it is sought to enforce it. He contends that a proceeding in rem can only be instituted where there is a maritime lien, and that the foreign judgment does not confer such a lien. I am of opinion that it is the duty

(1) 3 Dall. 54, 97, 118.

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of this Court to act as auxiliary to the Portuguese Court and to complete the execution of justice, which, owing to the departure of the ship, was necessarily left unfinished by that Court. In other words, it is my duty to place the English Court in the position of the Portuguese Court after its sentence has been given against the defendants. With respect to the motion now before me, I must take the facts from the indorsement on the writ of summons and the affidavit in support of the warrant, and from these I gather that there was substantially a judgment in rem in a Portuguese Court. There is no doubt that a collision, such as there was in this case, creates a maritime lien. In support of this, it is unnecessary to cite authorities. With regard to the further proposition that a proceeding for the enforcement of a maritime lien is a proceeding in rem the following remark of Lord Chelmsford in the case of *Castrique* v. *Imrie* (1) appears to be applicable:—

> This order for the sale of the ship, whatever may be thought of the original proceeding, appears to be a judgment in rem. Without, however, looking to this ultimate order, I think that the original proceeding being for the purpose of enforcing a maritime lien, which by the law of all foreign codes founded on the civil law, exists for money advanced for repairs and necessaries on the voyage, was a proceeding in rem.

This Court is now called upon to be an aidant to the enforcement of a judgment in rem, given by a Portuguese Court. With respect to the objection that no direct precedents have been cited in support of the course taken by the plaintiffs, it must be observed that until a recent period there were no reports of the courts exercising jurisdiction in accordance with the civil law, that is to say, the Ecclesiastical and Admiralty Courts. Moreover, it is to be remembered that, speaking generally, any Court which exercises a jurisdiction in rem has the res or some substitute for it, in the shape of a security within its reach, and the wrongdoer is seldom able to evade compliance with the orders of the Court. This Court, on the failure of the owners to pay for the damage adjudged to be done by their ship, would arrest that ship, and enforce the judgment against the res by sale. The occasion for the exercise of such a power of arrest seldom arises, though in a recent case, that of *The Troubador* (2), in 1878, the Court directed the

(1) Law Rep. 4 E. & I. 414, at p. 447.

(2) Not reported.

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issue of a warrant after judgment, for the purpose of enforcing payment of an award of salvage. And there have been several instances in which a ship has been arrested or re-arrested, in consequence of the bail becoming insolvent. In fact, what the Common Law Courts do indirectly by implying the contract, the Admiralty Court does directly, without any such implication, on the grounds of international comity. It is clearly for the interests of justice that this Court should exercise the jurisdiction as prayed, and having its hand upon the res, should not take it off until the sentence be executed, otherwise the wrongdoer might remove his ship out of its jurisdiction, and, by keeping out of Portuguese waters, defeat the just rights of the party who has suffered the wrong. It is to be borne in mind that this ship, the *City of Mecca*, is liable for the damage done by her to the plaintiffs' property, in a sense and in a manner that no other ship of the same owner would be liable. Upon the whole, I do not see why if this Court might ever have enforced a foreign admiralty judgment, and the authorities are ample upon this point, it might not enforce that judgment against the ship, and give that remedy in rem which was one of the special advantages incident to the jurisdiction of the Court of Admiralty. I reject the motion, without costs.

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendants under protest: *Gellatly, Son, & Warton.*

THE CARTSBURN. (1879 K. 191.)

1879
Nov. 18.

Damage—Claim to Indemnity by the Owners of Defendant's Vessel against Owners of the Tug towing the Vessel—Rules of the Supreme Court, Order XVI.

In an action of damage between two vessels, the Court has jurisdiction, under Order XVI., to determine whether or not the defendants' vessel is entitled to indemnity against a tug by which she was being towed at the time of the collision.

A collision took place between the vessels *S.* and *C.* The *C.* at the time was being towed by a tug. The owners of the *S.* instituted an action of damage against the *C.*, and alleged in their statement of claim that the collision was caused by the negligence of the *C.* and her tug, or of one of them. The owners of the *C.* obtained leave to issue a notice to the tug that they claimed to be entitled to indemnity, and the Court made an order that the owners of the tug be at liberty to appear and defend, being bound by any decision the Court might come to as to the cause of the collision.

At the hearing the owners of the tug appeared, but the defendants did not, and the Court pronounced that the *C.* was alone to blame for the collision, and that her owners were not entitled to indemnity over against the owners of the tug:—

Held, on motion on behalf of the owners of the *C.* to rescind so much of the judgment as pronounced that the owners of the *C.* were not entitled to indemnity, that the Court had not exceeded its jurisdiction.

Discharged partly by C.A. 6 Aft Cases 59.

THIS was an action of damage instituted on behalf of the owners of the barque *Slavia* against the ship *Cartsburn*.

The owners of the *Cartsburn* having entered an appearance, their solicitors took out a summons applying for leave to issue a notice against the owner of the *Leader*, a steam-tug, in tow of which the *Cartsburn* was at the time of collision, claiming indemnity from him in respect of the damage proceeded for in the action. By an order made on the summons on the 10th of June last the judge in chambers granted the leave applied for.

On the 14th of June the plaintiffs delivered their statement of claim, and therein alleged that on the evening of the 4th of May, 1879, the *Slavia*, whilst lying at anchor in Penarth Roads, was run into and damaged by the *Cartsburn* as that vessel came into the roads in tow of the *Leader*, and that the collision was occasioned by the neglect of the *Cartsburn* and the *Leader*, or of one of them. On the 18th of June the following notice, bearing date the 14th of

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June, was, together with a copy of the statement of claim, served by the defendants' solicitors on the owner of the *Leader*.

Take notice that this action has been brought by the plaintiffs against the defendants' ship the *Cartsburn* for damage alleged to have been sustained by the plaintiffs by a collision between the plaintiffs' barque *Slavia* and the *Cartsburn*. The defendants, the owners of the *Cartsburn*, claim to be indemnified by you against liability in respect of the said alleged damage, on the ground that the liability of the *Cartsburn* in respect of the said alleged damage, if any, arises from the negligence and improper navigation of the master and crew of the tug *Leader*, in tow of which tug the *Cartsburn* was, and that the *Leader* was owned and possessed by you and was being navigated by your servants. And take notice that if you wish to dispute the plaintiffs' claim in this action as against the *Cartsburn* or the said defendants, you must cause an appearance to be entered for you within eight days after service of this notice. In default of your so appearing you will not be entitled in any future proceeding between the defendants and yourself to dispute the validity of the judgment in this action, whether obtained by consent or otherwise.

On the 25th of June the owner of the *Leader* entered an appearance.

June 27. *W. Phillimore*, on behalf of the owners of the *Cartsburn*, in pursuance of notice of motion served on the plaintiffs and on the owner of the *Leader*, applied to the judge to give directions as to the mode of having the questions in the action determined.

E. C. Clarkson, for the plaintiffs, opposed the motion.

SIR ROBERT PHILLIMORE. I am of opinion that the application of the defendants is one that ought to be granted. The present case is, I think, one of those very cases to which the provisions of the 24th section of the Judicature Act, 1873, and the rules contained in Order XVI. of the Rules of the Supreme Court, must have been intended to apply. Moreover, the leave of the Court has been already obtained for the owner of the *Leader* to appear in the suit, and he has entered an appearance. I shall order that the owner of the *Leader* be at liberty to appear and defend, being bound, as between him and the defendants, the owners of the *Cartsburn*, by any decision the Court may come to in the action.

Application granted.

On the 28th of June, on application on behalf of the owner

of the *Leader*, the judge ordered that the order should be varied by adding the words "as to the cause of collision." The order as amended was, omitting immaterial parts, in terms as follows:—

The judge having heard counsel for the plaintiffs and the defendants, owners of the *Cartsburn*, ordered that Andrew Bain, owner of the steam-tug *Leader*, be at liberty to appear and defend, being bound as between him and the said defendants by any decision the Court may come to in this action as to the cause of collision.

On the 19th of July the owner of the *Leader* delivered to the plaintiffs a statement of defence. The statement of defence alleged in substance that at the time of the collision the *Leader* was towing the *Cartsburn* under an agreement to tow her into Penarth Roads, and was proceeding to the middle of the Roads to bring up there; that the *Cartsburn*, though previously directed to do so, neglected to follow the *Leader* round the stern of a barque anchored near the *Slavia*, and ultimately came into collision with the *Slavia*, notwithstanding that those on board the *Leader* did all they could to bring the *Cartsburn* round, and that the collision was not caused by any default or neglect on the part of those on board the *Leader*, but by the neglect or default of those on board the *Slavia*.

On the 30th of July the solicitors for the plaintiffs gave notice of trial to the owners of the *Cartsburn* and the owner of the *Leader*.

On the 6th of August the action was heard (1), and witnesses having been examined orally in court on behalf of the plaintiffs and the owner of the *Leader*, the Court made an order which, so far as material, was as follows:—

The judge having heard counsel for the plaintiffs and for the owner of the *Leader*, pronounced the collision in question in this action to have been occasioned solely by the fault or default of the master and crew of the vessel *Cartsburn*, and for the damage proceeded for, and condemned the owners of the said vessel *Cartsburn* and their bail in the said damages, and in costs. The judge further pronounced that the defendants, the owners of the *Cartsburn*, were not entitled to any contribution or indemnity against the owner of the steam-tug *Leader* in respect of the said damages or costs, and he condemned the said defendants and their bail in the costs incurred by the co-defendant.

Subsequently the solicitors for the owners of the *Cartsburn*

(1) The owners of the *Cartsburn* did not appear either by counsel or in person.

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gave notice that the judge in Court would be moved that so much of the judgment in the action as declared that the defendants, the owners of the *Cartsburn*, were not entitled to any contribution or indemnity against the owner of the *Leader*, or decided anything as between the said defendants and the owner of the *Leader*, or gave directions consequential upon such declaration or decision, be struck out.

In support of the motion an affidavit was filed which, inter alia, alleged that with the exception of the statement of claim no other pleading in the action was delivered to the owners of the *Cartsburn* either on behalf of the plaintiffs or of the owner of the *Leader*, and that the owner of the *Leader* did not serve the solicitors of the owners of the *Cartsburn* with any notice of trial.

Nov. 4. The motion was heard.

W. Phillimore, for the owners of the *Cartsburn*, in support of the motion:—The Court had no power at the trial to decide any question as to the liability of the owner of the *Leader* to indemnify the owners of the *Cartsburn*. The object of bringing in a third party, under the provisions of Order XVI. of the Rules of the Supreme Court, is merely to ensure that the judgment in the action against the original defendant should be binding on the third party whether he appears or not. [He referred to the form of notice given in Appendix B to the Rules of the Supreme Court.] No question can be tried in the action which is not a common question as between the plaintiff and defendant, and the defendant and the party brought in: *Benecke v. Frost.* (1) The owners of the *Cartsburn* might wish to shew that the liability of the owner of the *Leader* as against them depended on a question of contract, but by the judgment as it now stands they are precluded from doing this. This could never have been intended. The only defence which it was competent for the owner of the *Leader* to make in this action was that the plaintiffs could not recover against the owners of the *Cartsburn*: *Horwell* v. *London Omnibus Co.* (2) At any rate the owners of the *Cartsburn* had not proper notice that the question of the *Leader's* liability to them would be tried in the action.

(1) 1 Q. B. D. 419. (2) 2 Ex. D. 365.

Myburgh, for the owner of the *Leader.* The notice of the 14th of June was issued at the instance of the owners of the *Cartsburn,* and the subsequent order giving the *Leader* liberty to appear and defend was also granted on their application, therefore the owners of the *Cartsburn* cannot now be heard to complain of what they have caused to be done. The liability of the *Leader* in respect of the collision was "a matter relating to or connected with the original subject of the cause" within the meaning of the Judicature Act, 1873, s. 24, sub-s. 3. The questions now raised were discussed, when the order of the 27th of June was made, and it must then have appeared to the Court that it was proper that the questions arising between the owners of the three ships should be determined in one action: *Swansea Shipping Co.* v. *Duncan.* (1)

W. Phillimore, in reply.

Cur. adv. vult.

Nov. 18. SIR ROBERT PHILLIMORE. The question now to be decided arises under the rules relating to third parties to an action comprised in Order XVI. of the Rules of the Supreme Court.

A collision took place between two vessels, the *Slavia* and the *Cartsburn,* on the 4th of May last in Penarth Roads, Cardiff. At the time of the collision the *Slavia,* which was owned by the plaintiffs, was lying at anchor, and the *Cartsburn,* which was owned by the defendants, was in tow of a steam-tug named the *Leader,* owned by Andrew Bain.

The plaintiffs commenced an action in rem against the *Cartsburn* in the district registry at Cardiff, but the action was shortly afterwards transferred to the principal registry of this court, and appearances were entered for both parties. On the 10th of June last there came before me in chambers a summons issued by the defendants, on which the following order was made:—

The judge, having heard both solicitors, gave leave to the defendants to issue a notice to the owner of the vessel *Leader,* that they claim to be indemnified by the owner of the said vessel in respect of all damages and costs proceeded for in this action or incident thereto, and he directed the said defendants to file their preliminary act within three days.

On the 13th of June the defendants' preliminary act was filed.

(1) 1 Q. B. D. 644.

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On the 14th the plaintiffs' statement of claim was delivered, and on the 18th what is known as a third party notice was, together with a copy of the statement of claim, served by the defendants on Andrew Bain, the owner of the tug *Leader*. This notice and the service of it appear in all respects to have been in conformity with Order XVI., rule 18. On the 25th of June an appearance in the action was entered on behalf of Andrew Bain, and on the 27th, on the application of the defendants, the following order was made by me:—[His Lordship read the order as above set out, omitting the words "as to the cause of the collision."] The next day, on the application of counsel for the owner of the *Leader*, the words "as to the cause of the collision" were added to the order which I have just read. Such order, as amended was duly served upon the owner of the *Leader*.

The case came on for hearing in court on the 30th of June; but after two of the plaintiff's witnesses had been examined, it was adjourned. On the 12th of July, the registrar having heard the solicitors for the plaintiffs and for the owner of the *Leader*, directed the owner of the *Leader* to deliver his statement of defence within a week, and appointed the 6th of August for the trial. On the 19th of July the statement of defence of the owner of the *Leader* was delivered to the plaintiffs' solicitors, who filed printed copies of it on the 2nd of August, four days before the trial. In this statement of defence the *Slavia* was charged with neglect, which led to the collision; but blame was also imputed to the *Cartsburn*, who, it was alleged, disobeyed the orders given her from the steam-tug.

The owner of the *Leader* did not deliver to the solicitors for the defendants, the owners of the *Cartsburn*, any pleadings, or serve them with notice of trial; but they received, on the 30th of July, a notice of trial fixed for the 6th of August, purporting to be addressed to them and to the solicitors for the owner of the *Leader*.

The trial took place as appointed on the 6th of August. The plaintiffs and the owner of the *Leader* appeared and produced evidence, but the defendants, the owners of the *Cartsburn*, did not appear.

The minute of the judgment given is as follows:—[His Lordship read the order in question.]

The present application on the part of the owners of the *Cartsburn* is to strike out so much of this judgment as declares that such owners are not entitled to any contribution or indemnity against the third party, the owner of the *Leader*, or decides anything as between the said owners and the said owner of the *Leader*, or gives directions consequent upon such declaration or decision; and to direct that the costs of this application be paid by the owner of the *Leader*.

The owners of the *Cartsburn* appear to have no substantial ground for their application. They introduced the owner of the steam-tug as a party to the action, and they were, or ought to have been, aware that the whole question as between the three parties would be disposed of at the trial. The object of these rules relating to the introduction into a suit of third parties, as prescribed by the Judicature Act of 1873, was, to adopt the words of the Master of the Rolls in the case of *The Swansea Shipping Co.* v. *Duncan* (1),

> to prevent the same question being tried twice over, where there is any substantial question common as between the plaintiff and defendant in the action, and as between the defendant and a third person; and in such a case the third person is to be cited to take part in the original litigation, and so as to be bound by the decision on that question once for all.

If the *Cartsburn* were to be allowed now to raise an issue between herself and the steam-tug as to the facts of the collision, the result would be precisely what it was the intention of the legislature to obviate. The case would substantially be heard twice over. With regard to the technical point of procedure that has been raised, I cannot see that there has been any material departure from the course prescribed by Order XVI., Rules 17, 18, 20, and 21.

The order of the 27th of June, giving to the owner of the *Leader* liberty to defend, the notice of trial of the 30th of July, addressed to the owner of the *Leader*, as well as to the defendants, and the statement of defence of the owner of the *Leader*, imputing blame to the *Cartsburn*, which was filed on the 2nd of August, were sufficient notice to the owners of the *Cartsburn* that they would have to meet at the trial the cases set up both by the *Slavia*

(1) 1 Q. B. D. 644, at p. 649.

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and by the *Leader*. They did not choose to appear. It would seem as if they meant, in the event of the *Slavia* being found to blame to have the advantage of the finding of the Court and, on the other hand, if the *Cartsburn* was found to blame, to deny that she was affected by the sentence. I dismiss this application with costs.

Solicitors for plaintiffs: *Ingledew, Ince, & Greening.*
Solicitors for owners of the *Cartsburn: Fielder & Sumner.*
Solicitors for owner of the *Leader: Clarkson, Son, & Greenwell.*

August 11.

[IN THE CONSISTORY COURT OF LONDON.]

THE RECTOR, CHURCHWARDENS, AND BURIAL BOARD OF THE PARISH OF ST. GEORGE'S, HANOVER SQUARE *v.* HALL AND LORD GEORGE PAGET.

Mortuary—Faculty—Costs.

The rector, churchwardens, and burial board of an urban parish applied for the grant of a faculty to authorize the erection of a parochial mortuary with a post-mortem room attached, in a consecrated burial ground situate in a populous part of the parish, and closed for burials by Order in Council. The Court being of opinion that the petitioners had made out their case for the establishment of a mortuary on the site proposed, directed that a faculty should issue for the erection of the mortuary, but directed that certain conditions to be specified in the faculty should be imposed with respect to the manner of using the mortuary.

THIS was a cause of faculty brought by the Rev. E. Capel Cure, the rector, Mr. Hugh H. Seymour, and the Duke of Westminster, the churchwardens, and the burial board of the parish of St. George's, Hanover Square, in the county of Middlesex, for the purpose of obtaining a licence or faculty authorizing the erection of a public mortuary in the old burial ground of the parish situate at the rear of Mount Street, Grosvenor Square.

The petition alleged that the vestry of the parish had resolved to erect the proposed mortuary, subject to the faculty being obtained, and that the expense of its erection would be borne by the vestry under the Sanitary Act, 1866. (1)

On the 18th of March last an appearance was entered for

(1) See now the Public Health Act, 1875 (38 & 39 Vict. 55), ss. 141, 143, empowering local authorities to provide mortuaries and places for post-mortem examinations.

Mr. R. D. Hall, a parishioner and ratepayer of the parish, and his proctor, having prayed to be heard in objection to the faculty, on the 25th of March brought in an answer, wherein it was alleged that the opponent was the lessee and occupier of a house looking upon, and within thirty yards of the site of the proposed mortuary; that the erection of the mortuary would depreciate the value of such house, and that it was proposed that the mortuary should receive the bodies of persons dying of infectious diseases, and danger and offence would thereby be caused to the opponent and the occupiers of other houses in the immediate neighbourhood.

Subsequently further pleadings were entered into and evidence on affidavit brought in on behalf of the opponent; the nature of such pleadings, and the result of such evidence, appear from the judgment.

June 9, 16. The cause came on for hearing.

On the cause being called on an application was made by counsel that Lord George A. Paget should be allowed to enter an appearance and intervene as opponent in the suit, and the Court having granted the application, witnesses were examined orally on behalf of the petitioners and of the opponents.

Dr. Spinks, Q.C., and *Brabant*, for the petitioners.
Dr. Swabey, for the opponent, Lord G. Paget.
W. G. F. Phillimore, for the opponent, Mr. Hall.

Cur. adv. vult.

Aug. 11. DR. TRISTRAM. This is an application for a faculty to authorize the erection of a parochial mortuary, with a post mortem room attached, in the old burial ground of St. George's, Hanover Square, situate between Mount Street and South Street. The petitioners are the rector, and Mr. Hugh H. Seymour, and the Duke of Westminster, the churchwardens and the burial board of the parish. The faculty is opposed by Mr. Hall, the lessee and occupier of No. 101, Mount Street, one of the houses abutting on the burial ground, on behalf of himself and other lessees and inhabitants in the neighbourhood, and also by Lord George Paget, as lessee and occupier of a house and premises in Farm Street.

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The ground of opposition is not that the Court would be exceeding its jurisdiction in granting the faculty, but that the site in question is unsuitable and inconvenient for the purpose, and that the erection of a mortuary there would be injurious to the health of the neighbourhood, as well as detrimental to the adjoining property.

The question of the jurisdiction of the Court to grant such a faculty was argued at length, and considered in the case of *Hansard* v. *The Parishioners of St. Matthew, Bethnal Green* (1), in which I held that the appropriation for the use of the parishioners of a small portion of a churchyard, as a temporary instead of a permanent resting-place for the dead, was not an illegal diversion of consecrated ground from ecclesiastical to secular purposes; and that as there were precedents for the granting of such faculties, on the Court being satisfied that it is essential to the health of the parish that there should be a mortuary, and that the burial ground is the most convenient and suitable of the available sites in the parish, the faculty might properly issue.

The first question for the consideration of the Court is whether the establishment of a parochial mortuary is desirable for the health of this parish. The evidence on this part of the case is as follows:—The population of the civil parish of St. George's, Hanover Square, in 1871, was 89,687; the boundary of the parish on the north is Oxford Street; on the east Regent Street and St. James's Street; on the west, Hyde Park; and on the south, Ranelagh sewer. The greatest portion of its area is, of course, inhabited by persons in the higher grades of life, but there are numerous small streets, mews, and courts, even in the Grosvenor Square district, which contain a large population of the working classes, many of their families occupying two, and many one room only. In the case of a death, therefore, whether from infectious or non-infectious disease in any such family, the body at present must remain until interment in the room where the other members of the family are living and sleeping. Of this there were two instances given in evidence in the Grosvenor Square district, one of a man who died in December last, leaving a widow and four children, and another of a man who died in April last, leaving

(1) 4 P. D. 46.

a widow and six children, and in each of these cases the families were in occupation of one room only, in which the corpse was obliged to be retained until burial. The medical officer of the parish, Dr. Corfield, stated that the want of a public mortuary to which bodies might be removed, either under the compulsory powers conferred upon him by the Sanitary Acts, or upon suggestion made by him, had lately been frequently made apparent in both infectious and non-infectious cases. The only places in the parish set apart for the reception of dead bodies are the dead-house belonging to and adjoining the workhouse (a small and badly ventilated building), which is for the exclusive use of the workhouse, and a small mortuary underneath St. Mark's Church, which is primarily for the inhabitants of the ecclesiastical parish of St. Mark's, and in which bodies that have died from infectious diseases are not received. So that at present the medical inspector of the parish is powerless to carry out the compulsory powers of the Sanitary Acts in this respect.

From the evidence in this and in previous cases, the Court has come to the conclusion that it is for the interest of all classes of society, for the higher as well as for the lower classes, that as far as practicable this danger should be prevented, and it is to be remembered that many of the working classes, who have this limited accommodation, are employed in making articles of clothing for the higher classes and otherwise are brought in contact with the households of the higher classes. Thus diseases may be communicated by contagion to any household.

The next question for consideration is whether the site proposed is the most convenient of the available ones in the parish. It was said it was not central. Undoubedly, although it is in the centre of the Grosvenor Square district, it is not in the centre of the civil parish. But the only other available site is another parochial burial ground, abutting on Albion Street, Hyde Park, which is in the extremity of the parish, and therefore more inconvenient.

Another objection is that the mortuary will be detrimental to the house property abutting on the burial ground. This objection is entitled to very great consideration. This Court ought to be most reluctant to grant faculties to the detriment of private

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property, and I should not do so unless compelled by a sense of necessity and duty. A mortuary, wherever established, will, to a greater or less extent, be a detriment to most residential properties; and it is this that places an almost insuperable bar in the way of vestries purchasing land in residential districts for parochial mortuaries. If the owner of any plot of land were not to object himself to sell, objection is sure to be taken by owners of adjoining properties, who by bidding against the vestry or other means will endeavour to prevent the vestry from becoming the purchaser. The result is that vestries are compelled to fall back upon their parochial churchyards, and it appears to the Court that owners of property and residents in the neighhourhood of the London churchyards have less cause (if any) of complaint against the erection of mortuaries in closed churchyards, provided due precautions are taken to prevent such mortuaries being injurious to health or creating an unnecessary annoyance to the neighbourhood. The burial ground now in question was set apart and consecrated as the sole churchyard of the parish in 1725, and burials were permitted to be made in it without restrictions until 1825, when they were limited by a private Act of Parliament to families who had acquired rights of burial there. Such limited burials were allowed until 1855, when the ground, by an Order in Council, was closed for all burials. The houses in Mount Street and the other houses abutting on the burial ground were built some fifty or sixty years after its consecration, and were therefore erected subject to any inconvenience which might arise from their proximity to a churchyard. The closing of the churchyard for all burials was a boon to the neighbourhood, and would no doubt have the effect of increasing to some extent the value of the adjoining houses, but it was not with the object of increasing the value of such houses that burials were prohibited there, but from sanitary reasons. Under such circumstances it appears to the Court more reasonable and equitable that mortuaries should, in residential parishes, be erected in the closed churchyards rather than be forced on the owners of property and inhabitants of other parts of the parish. But as in the present case the leases of the adjoining houses will fall in during the next six or eight years, any depreciation of the value of the property which may be

occasioned by the issue of the faculty asked for will fall principally upon the Duke of Westminster as the ground landlord, who is one of the petitioners for the mortuary. A further and more serious objection, if it could be established, is that the establishment of the mortuary will be injurious to the health of the neighbourhood. Upon this point Dr. Tidy, Professor of Chemistry and Forensic Medicine in the London Hospital and Medical Officer of Health for Middlesex, and Dr. Corfield gave very important evidence. The result of their evidence may be thus stated. Infectious complaints are liable to be transmitted both by infection and contagion. But the moment vitality is gone from a body, the danger of transmitting disease by infection ceases, and the danger of transmitting it by contagion, i.e., through persons coming in contact with the dead body or infected articles, is the sole remaining risk. The certain safeguard against this danger is the placing of disinfectants in the coffin and fastening the lid tightly down before removal from the house. There is vested in this Court a discretion as to the terms or conditions upon which it will issue a faculty for a mortuary, and it seems to me that the inhabitants of a neighbourhood in which it is proposed to establish it may fairly ask the Court not to issue such a faculty, without inserting in the grant conditions to prevent the establishment of the mortuary from becoming injurious to their health, or from its being an annoyance to them beyond what public convenience may require.

Since the hearing of the case I have inspected the burial ground and neighbourhood, and I have come to the conclusion that the faculty should issue for the erection of the mortuary on the site proposed, but that the petitioners should have power to excavate for its foundation, and for that purpose to remove and reinter bodies found on the site, so as to make it less conspicuous to the houses adjoining, and that the tombstones on the site should be placed in an erect position against the walls of the burial ground. The Court will also order that the faculty contain a proviso, that before the removal of the body of a person who has died from an infectious disease from the house to a mortuary, disinfectants shall be placed in the coffin and the lid screwed down, a provision which the medical officer of the parish has power to enforce.

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As it would be extremely inconvenient and, in my judgment, would press with unnecessary hardship on the inhabitants of some of the houses in Mount Street and the neighbourhood if bodies were allowed to be brought to the mortuary at all hours of the day, including business hours, when Mount Street is most crowded, the Court will direct a further proviso to be inserted, that bodies shall not be received between the hours of 8·30 in the morning and 8·30 at night, and by these precautions it trusts that it will have, as far as is practicable, removed the objections taken to the establishment of the mortuary.

There only remains the question of costs. I think the costs incurred by Mr. Hall and by Lord George Paget have been reasonably incurred, and that they may be treated as costs incidental to the obtaining of the faculty, and ought to be paid by the vestry. In future cases, when an application is made for a mortuary I think that the inhabitants of the neighbourhood ought to be represented by a solicitor and counsel at the cost of the applicants for the faculty, with a view to bring to the attention of the Court any facts which they may think it desirable in the interests of any of the owners and occupiers of the adjoining property; but in cases which are not exceptional it must be understood that the Court will only allow one set of costs.

The faculty will issue upon the above terms for the mortuary with the post-mortem room as incident to the mortuary; the access to the mortuary to be by the present access to the burial ground.

Solicitors for petitioners: *Capron & Co.*
Proctor for opponent: *Oldershaw.*
Solicitors for intervener: *Low & Co.*

THE MATTHEW CAY. (1879 B. No. 106.) 1879

Practice—Damage—Defence on Merits and on Ground of Compulsory Pilotage —Costs. Nov. 26.

Where the defendants in a collision suit raise a defence on the merits, and also set up a plea of compulsory pilotage, and the Court dismisses the suit on the ground that the plea of compulsory pilotage is established, each party to the suit will, in accordance with the practice prevailing in the Court of Admiralty before the Judicature Acts, be left to bear his own costs.

THIS was an action of damage instituted on behalf of the owner of the paddle steamer *Wye* against the owners of the steamship *Matthew Cay*. The statement of defence alleged that at the time of the collision the *Matthew Cay*, in tow of a steam-tug, bound on a voyage from Bristol to Cardiff, was proceeding down the river in charge of a duly licensed pilot, and after setting out the circumstances under which according to their case the collision occurred proceeded, so far as material, as follows:

The collision was caused by the negligent navigation of the *Wye*.

Save as herein admitted, the defendants deny the truth of the several allegations in the statement of claim, and the defendants deny it to be the fact that the *Matthew Cay* or her tug respectively were or was guilty of all or any of the acts of negligence alleged in the statement of claim.

If and so far as the collision was occasioned by any improper or negligent navigation of the *Matthew Cay* or her tug, it was solely occasioned by some fault or incapacity of the pilot of the *Matthew Cay*, who was a qualified pilot acting in charge of the *Matthew Cay*, within a district where the employment of such pilot was compulsory by law, and whose orders were obeyed by the masters and crews of the *Matthew Cay* and her tug.

Nov. 22. The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House.

Witnesses were examined in court on behalf of the plaintiff and the defendants. The several witnesses called on behalf of the defendants gave evidence as well in support of the allegations in the statement of defence that the *Wye* and not the *Matthew Cay* was alone to blame for the collision, as of the alternative defence that the *Matthew Cay* was, at the time of the collision, subject to compulsory pilotage, and had on board and in charge of her a duly licensed Bristol pilot, whose default or neglect solely occasioned the collision; and the Court pronounced that the

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Matthew Cay was only to blame for the collision, but that the pilot of the *Matthew Cay* was at the time of the collision acting in charge of her by compulsion of law, and that the collision had been solely occasioned by his default or neglect, and dismissed the action.

Milward, Q.C., and *E. C. Clarkson*, for the defendants, applied for the costs of the action, or in the alternative, for the costs of the issues on which they had succeeded. It is admitted that by the practice of the Court of Admiralty the action would have been dismissed without costs, but this is not the rule of practice in the three Common Law Divisions, and if the action had been brought in one of those Divisions the defendants would have been held entitled to at least some of the costs asked for. It is not right that there should be one rule as to costs in one branch of the High Court of Justice, and another rule in other branches of the same court: *The Condor.* (1)

Bompas, Q.C., and *Myburgh*, for the plaintiff opposed the application, on the ground that the practice of the Court of Admiralty had been founded on a right principle, and had been sanctioned by the Court of Appeal since the coming into operation of the Judicature Act, and that as the costs were in the discretion of the Court: Rules of the Supreme Court, Order LV., the Court, in the exercise of that discretion, would consider that the proper order to make would be to dismiss the action without costs: *The Daioz* (2); *The General Steam Navigation Co.* v. *The London and Edinburgh Shipping Co.* (3)

Cur. adv. vult.

Nov. 26. SIR ROBERT PHILLIMORE. This is a case in which the defendants pleaded, by way of defence, both the merits and compulsory pilotage. The Court was of opinion that the plaintiff was right on the question of the merits, and the defendants were right on the question of compulsory pilotage, and the matter stood over for the consideration of the Court as to what order it should make with respect to costs. Now the recent

(1) 4 P. D. 115, at p. 120. (2) 3 Asp. Mar. Law Cas. 477.
(3) 2 Ex. D. 467, at p. 469.

decisions of the Court of Appeal have not left the question of costs in a very satisfactory state. The decision of that Court in the case of *The Daioz* (1) was in 1877, and the Master of the Rolls in giving the judgment of the Court in that case said "The rule acted on in the Admiralty Court in cases like the present, was that when the owners of a vessel were relieved from liability on the ground of compulsory pilotage, no costs were given on either side, and the same rule ought to apply in the Court of Appeal; there will therefore be no costs, either in the Court below or in the Court of Appeal." That was in a case where compulsory pilotage was pleaded. Then there is another case, a later case, which turned on the question of inevitable accident. I refer to the case of *The Condor* (2) in 1879. In that case Lord Justice James is reported to have said that it required great consideration "whether it could be right that there should be one rule as to costs in one branch of the High Court of Justice and another in another branch of the High Court of Justice," and to have said afterwards, "I think, however, that it may be considered as settled that there will be no difference in future in the rule as to costs." That was with regard to the question of costs in cases of inevitable accident. It appears to me that I must follow the rule laid down in the case of *The Daioz* (1), and I think it would be found, upon inquiry, to work a great injustice if that rule was to be changed. I say nothing about the rule in cases of inevitable accident; but where compulsory pilotage is pleaded by way of defence, together with a defence as to the merits of the collision, I do not see how the owner of a vessel which suffers wrong is to know, when the action is brought, either that there is a pilot on board, or that he is a duly licensed pilot, or that the crew did or did not obey his orders, or did not contribute by their own negligence to the collision. There are many circumstances which seem to take the practice with regard to costs as applied to cases where compulsory pilotage is pleaded out of that rule, which, according to the decision in the case of *The Condor* (2), might be laid down in cases of inevitable accident. Until better instructed I shall, in cases where the defence of compulsory pilotage is set up as well as a defence on the merits, and the defendants succeed in establishing

(1) 3 Asp. Mar. Law Cas. 477. (2) 4 P. D. 120.

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the defence of compulsory pilotage, adhere to the ruling laid down in the case of *The Daioz* (1), and, therefore, I shall dismiss the case without costs on either side.

Solicitors for plaintiff: *Luard & Shirley.*
Solicitors for defendants: *Ingledew, Ince, & Vachell*

Nov. 15.

THE CONSETT. (1879 R. 376.)

Practice—Damage—Action of Damage by Owners of Ship and Owners of Cargo —Costs of Affidavits in support of Owners of Cargo's Claim at Reference.

In an action of damage brought by the owners of the ship *J.* and the owners of the cargo on board her against another vessel, the Court pronounced that the two vessels were both to blame for the collision, and condemned the defendants in a moiety of the damage proceeded for:—

Held, that the owners of the cargo on board the *J.* were entitled to the costs of the affidavits brought in by them in support of their claim at the reference.

This was an action of damage instituted on behalf of the owners of the ship *Jessore*, her master and crew, and the owners of the cargo lately laden on board her, against the steamship *Consett*. The action was heard on the 25th of January last, and the judge made an order of which the following, omitting immaterial parts, is a copy:—

The judge pronounced the collision to have been occasioned by the fault of the master and crew of the *Consett*, and by the fault of the master and crew of the *Jessore*, and that the damage arising therefrom ought to be borne equally by the owners of the *Consett* and by the owners of the *Jessore*, and he condemned the owners of the *Consett* in a moiety of the plaintiffs' claim in respect of the said damages, and he also condemned the owners of the *Jessore* in a moiety of the defendants' counter-claim in respect of the said damages, and he referred the said damages to the registrar, assisted by merchants, to assess the amount thereof, but made no order as to costs.

Subsequently the claim of the plaintiffs in the action was filed, and affidavits in support thereof were brought into the registry on behalf of the owners, master, and crew of the *Jessore*, and on behalf of the owners of the cargo of the *Jessore*.

On the 31st of October last the registrar reported, inter alia, that the moiety of the damages claimed by the owners of the cargo of the *Jessore* amounted to 15,095*l.* 11s., and that of this sum they

(1) 3 Asp. Mar. Law Cas. 477.

ought to be allowed the sum of 15,094*l.* 2*s.* 10*d.* The registrar made no report as to how the costs of and incident to the reference should be borne.

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Butt, Q.C. (*Myburgh*, with him), on behalf of the owners of the cargo of the *Jessore*, moved the judge in court to order the owners of the *Consett* to pay to the owners of the cargo of the *Jessore* the costs of the reference and the costs of and relating to the affidavits brought in by them in support of their claim in the reference. By the practice of the Court the owners of the cargo of the *Jessore* would, if they had been the sole plaintiffs, have been held entitled to the costs applied for: *The City of Manchester*. (1) They ought not to be placed in a worse position because they have for the saving of expense joined the owners of the *Jessore* in bringing this action.

E. C. Clarkson, on behalf of the owners of the *Consett*, opposed the motion.

SIR ROBERT PHILLIMORE. I am of opinion that the Court has not yet adjudicated upon the question whether the owners of the cargo of the *Jessore* are entitled to the costs now applied for. It is not denied that, according to the present practice of the Court, the owners of the cargo of the *Jessore* would if they had brought a separate action against the *Consett* have been entitled to the costs of the affidavits in question, and it is clear that the effect of their bringing a joint action with the owners of the *Jessore* has been a saving and not an increase of expense to the owners of the *Consett*. I am of opinion that the owners of the cargo of the *Jessore* are entitled to the costs of the reference and the costs of and relating to the affidavits which were brought in and used in support of their claims at the reference.

Solicitors for plaintiffs: *Gregory, Rowcliffe, & Rawle.*

Solicitors for defendants: *Cooper & Co.*

(1) 5 P. D. 3.

1879
Dec. 8.

[IN THE COURT OF APPEAL.]

THE ROBERT DIXON. (1879. J. 173.)

Salvage—Towage Contract—Counter-claim for negligent Towage.

A tug under contract to tow a ship is not entitled to salvage remuneration for rescuing the ship from danger brought about by the tug's negligent performance of her towage contract.

A tug agreed to tow a ship from Liverpool to the Skerries for a fixed sum. The tug imprudently towed the ship in bad weather too near a lee shore, and, the weather becoming worse during the performance of the agreed towage service, the hawser parted and the ship was placed in a position of danger and was compelled to let go her anchors to avoid being driven on shore. From this position she was rescued by the tug, having been compelled to slip her anchors and chains, which were lost:—

Held (affirming the decision of the Judge of the Admiralty Court), that the tug was not entitled to claim salvage remuneration, and that her owners were liable to pay for the loss of the anchors and chains.

Semble, If a tug receives positive directions from the ship she is towing as to the course she is to steer, she is bound to obey them; and if the ship gets into danger in consequence of such directions the tug is not liable.

THIS was an appeal from a judgment of the Judge of the Admiralty Court, Sir R. Phillimore. (1)

The action was brought by the owners of the steam-tug *Commodore* against the ship *Robert Dixon* for salvage.

The statement of claim, the statement of defence and counter-claim, and the effect of the evidence are fully set out in the previous report. The principal facts established by the evidence adduced by the respective parties, were shortly as follows:—

On the 13th of March, 1879, the tug *Commodore*, having been engaged to tow the *Robert Dixon* from Liverpool to the Skerries for the sum of 49*l.*, towed the vessel out of dock and down the river, crossing the bar at about 5·30 P.M. At this time the wind was from the northward with a strong breeze, the sea moderate, the course taken being W.N.W. which direction was indicated to the master of the tug by the master of the *Robert Dixon* at the commencement of the voyage. The two vessels were taken inside the Pilot Boat No. 6, which was moored off the coast; and it was

(1) 4 P. D. 121.

alleged by the defendants that the safe course would have been to keep outside that boat. At 11 P.M., the sea rising and the wind increasing to a gale, the tug hauled up to N.W. by W. and afterwards to N.W., and at 12·30 again altered the course to N.W.½N. At 1 o'clock the tug's hawser parted, and after some ineffectual attempts had been made by the tug to get hold of the *Robert Dixon* again, during which the ship drifted to leeward within three miles of the shore off Bull Bay, she was hailed by the tug to let go her anchors, which she did. The ship however dragged her anchors and drifted towards the shore into a dangerous position. The gale continued all night and the ship continued drifting, but in the morning about 9·30 o'clock the tug succeeded in getting hold of the ship's hawser and towed her to a safe offing about seven miles N.W. of the Skerries, but the *Robert Dixon* was obliged to slip both her anchors.

The owner of the tug claimed salvage for these services, and the owners of the *Robert Dixon* put in a counter-claim claiming damages for the loss of their anchors and chains, which they alleged to have been caused by the negligent and improper towage of the *Commodore*.

The Judge of the Admiralty Court held that the ship was placed in a position of danger by reason of the tug imprudently towing her in bad weather too near a lee shore; and that the tug, having materially contributed to the danger in which the vessel had fallen, could not claim salvage remuneration; and he also held that the defendants were entitled to recover compensation under their counter-claim for the loss of their anchors and chains.

From this judgment the plaintiffs appealed. The arguments on the appeal related entirely to the effect of the evidence.

Webster, Q.C., and *Potter*, for the plaintiffs.

Milward, Q.C., *G. Bruce*, and *F. W. Raikes*, for the defendants, were not called on.

JAMES, L.J.:—It appears to us, and the assessors who have assisted us, not only that it is impossible for us to say, as we should have to do if we overruled the judgment appealed from,

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that there was not sufficient evidence before the Judge of the Admiralty Court to warrant his finding, but that if the case came for the first time before us as a new matter the evidence would not warrant any other conclusion. Whether the evidence establishes that the tug acted in violation of any positive directions from the ship during the voyage it is not necessary for us to give an opinion, because if it be true that no directions were given to the tug apart from the general directions at the commencement of the towage, it comes to this, that the master of the tug was acting as it was his duty to do on his own discretion to take the ship on a safe course to the Skerries, allowing for possible contingencies and a change of weather. It appears to our assessors and to me that the tug ought not to have taken a course inside the inshore pilot boat. That boat was purposely moored where it was in order to be inside the usual tracks of the ships, and I think the tug ought not to have gone inside the boat. If so the decision of the Judge of the Admiralty Court is warranted by that fact alone; and the tug did by its want of skill and prudence—for I see no reason whatever to attribute to the master any intention to make salvage—bring the ship into a position of danger by which the injury occurred. Therefore upon the main point whether the tug is entitled to salvage I am of opinion that it is not so entitled, and I also think that when an accident happens, and the original danger is found to have occurred through want of skill, the loss occasioned by the accident, as the loss of the anchors was in this case, is properly attributable to the want of skill which caused the original danger. It might have been different if the accident had happened from the want of power in the ship. It was suggested in the present case that the accident happened through the drunkenness of the crew, but the evidence in support of that charge is far too shadowy for the Court to attach any importance to it. Therefore, on both points, the appeal must be dismissed.

BAGGALLAY, L.J. I am of the same opinion. This is an action of salvage for services performed by a tug which was at the time under contract of towage from Liverpool to the Skerries. The suggestion made by the plaintiffs is that the ship met with a misfortune beyond the control of the tug, and the tug was used

for salving the ship. *The Minnahaha* (1) lays down clearly under what circumstances a towage contract can be turned into a salvage. "If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct or by negligence, or by the want of that reasonable skill or equipment which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage. She can never be permitted to profit by her own wrong or default." The principles there stated have been universally recognised. The only question here is whether the danger into which the ship was brought was fairly attributable to the fault of the tug; I do not say to the wilful misconduct of the master of the tug—that charge has been negatived by the Judge of the Admiralty Court and I do not suggest it—but by his negligence or want of skill. I think that it was so attributable. I am persuaded that the course made by the tug was not the safe course, and that she continued in it too long, and so got the ship into a dangerous position.

BRETT, L.J. The plaintiffs being under a towage contract, bring this action, in which they assert that the towage service was altered into salvage; and it seems to me that the plaintiffs are in this position, that it lies on them to shew that the change occurred without any want of skill on their part, but by mere accident over which they had no control. The burden of proof on both the affirmative and the negative issues is on the plaintiffs, that is, both that there was an inevitable accident beyond their control, and that they shewed no want of skill. In that proof, in my opinion, they fail; and I think they fail mainly on their own evidence, and that it is not necessary to rely on the evidence of the defandants' witnesses.

On the plaintiffs' own evidence, it appears that when the licensed pilot left the ship she was left in the command of the captain with the assistance of a channel pilot, and the command remained in the captain during the whole of the transaction. I think it is proved by the plaintiffs' witnesses that the captain did

(1) Lush. 335, 349.

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direct the general course to be taken by the tug. I am very much inclined to think that a tug is bound to obey the orders of the captain, and if the captain had insisted on the tug keeping that course, the tug would have been bound to obey; certainly, the captain could not have complained of the tug obeying him. But here, on the plaintiffs' own shewing, the only evidence was that at the beginning of the towage the tug was directed to tow the ship in a particular course. I assume that to have been the right course; but on the way the weather became threatening. Assuming that no further order was given by the captain, it was the duty of the tug to use reasonable care and skill, and unless she was ordered to the contrary, she had the command of the course.

The weather became more and more threatening; the ship sagged to the leeward more than she ought. Then the tug ought to have altered her course and kept more off the shore, so as to avert the danger. But undoubtedly the master of the tug, by reason of negligence—I do not for a moment accuse him of anything worse—allowed the ship to get too much to leeward and to come to a place where she ought not to have been. They went inside the inshore pilot boat, and they ought to have gone outside it. The assessors of the Judge of the Admiralty Court and our assessors all agreed that the ship ought not to have been in that position. Therefore, unless the master of the tug can clear himself by shewing that he acted upon orders from the ship, he cannot excuse himself from the charge of negligence, and the burden lies on him to do so. He may have done right when he changed his course towards the north, but then it was too late. It was too late then to draw the ship away from the shore. The result is that the plaintiffs have not shewn that the danger was not incurred through their want of care. If so, this towage service was never changed into salvage. Whether they were entitled to towage under their contract is not now before us, but certainly they are not entitled to salvage. In the counter-claim the burden of proof is also on the plaintiffs. For it being proved that the ship was brought into a dangerous position on a lee shore by their fault, unless they can shew that it was the fault of the ship's crew that they were obliged to slip their anchors, the plaintiffs are liable

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for the loss. In my opinion they have failed in discharging themselves of this burden also, and they must therefore be held liable for the loss.

Judgment affirmed.

Solicitor for plaintiffs: *Ayrton.*
Solicitor for defendants: *J. Neal.*

[IN THE COURT OF APPEAL.]

1880
Jan. 26.

THE CARTSBURN. (1879 K. 191.)

Claim for Indemnity—Notice to Third Party—Rules of Supreme Court, Order XVI.

A collision took place between the ship *S.* and the *C.*, which was being towed by a tug. The owners of the *S.* brought an action against the owners of the *C.*, alleging the collision to have been occasioned by the negligence of the *C.* and her tug, or one of them. The owners of the *C.* obtained leave to serve notice on the owner of the tug that they claimed to be entitled to indemnity, and the Court made an order that the owner of the tug should be at liberty to appear and defend, "being bound as between him and the defendants by any decision the Court may come to in this action as to the cause of collision." At the hearing the owner of the tug appeared, but the defendants did not, and the Judge of the Admiralty Court pronounced that the collision was occasioned by the default of the master and crew of the *C.*, and condemned the owners in damages and costs, and declared that they were not entitled to indemnity from the owner of the tug:—

Held, on appeal, that the order giving the owner of the tug liberty to appear and defend did not put matters in train for trying any issue between him and the defendants, and that so much of the judgment as negatived the right to indemnity by the owner of the tug must be struck out.

THIS was an appeal by the owners of the *Cartsburn* from a judgment of the Judge of the Admiralty Court, Sir R. Phillimore. (1)

Jan. 13, 14. *Cohen, Q.C.*, and *W. G. F. Phillimore*, for the appellants. The notice here was given under Order XVI., and the object of bringing in a third party under that order is merely to insure that the judgment in favour of the plaintiff shall be binding on him, but not to decide questions as between the third party and the defendant. No pleadings were delivered as between the owners of the *Cartsburn* and the *Leader*, nor were any directions

(1) 5 P. D. 35.

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given under which an issue between them could be tried. *Treleven* v. *Bray* (1) shews the restricted effect of Order XVI. In order to try the question between defendants the proceedings should have been taken under s. 24, subs. 3 of the Act of 1873. The rules 17–21 of Order XVI., all refer to questions in the action.

[COTTON, L.J. Is it not a question in the action whether the tug was in fault?]

No, for it makes no difference to the plaintiffs whether the *Cartsburn* or the tug was in fault. In *Walker* v. *Balfour* (2) a question was tried as between the defendant and a third party, but in that case there were pleadings between them. Here no pleading by the third party has been served upon the appellants. The rules state that the object is to bind the third party; nothing is said about binding the defendant. The only defence which the owner of the *Leader* could set up in this action was that the plaintiffs could not recover against the *Cartsburn*: *Horwell* v. *London General Omnibus Co.* (3) The proceeding was one in which the appellants were not bound to appear, for they knew that they had no defence as against the plaintiffs, and to bind the appellants by this decision in their absence is a miscarriage of justice.

Myburgh, and *Raikes*, for the owner of the *Leader*. In the pleadings of the *Cartsburn* there was an admission of no defence. The only question to be tried was between the *Cartsburn* and the *Leader*, and the application of the 28th of June was for the purpose of having that question tried, and that order was served by the owners of the *Cartsburn* on the owner of the *Leader*. The owners of the *Cartsburn* had notice of trial, they knew that the pleadings were complete, and they might have seen all the pleadings that there were.

[JAMES, L.J. How do you shew that they knew that a question between you and them was going to be tried?]

Witnesses had been examined de bene esse before the trial for the purpose of throwing the blame on the *Cartsburn*, and it was default of the owners of the *Cartsburn* not to appear at the trial. The judge and the counsel for the plaintiffs and for the owner of the

(1) 1 Ch. D. 176. (2) 25 Weekly Rep. 511.
(3) 2 Ex. D. 365, 377.

Leader all understood the order of the 28th of June as intended to settle the whole matter, and the owners of the *Cartsburn* must have known that the proceedings were conducted on that footing.

Cohen, Q.C., in reply.

Jan. 26, 1880. The judgment of the Court (James, Baggallay, and Cotton, L.JJ.) was delivered by

JAMES, L.J. The facts of this case are fully set forth in the report of the case in the Court below, and it is not necessary therefore to restate them.

The applicants, the proprietors of the ship *Cartsburn*, gave notice in the Court below and have repeated it here as follows:— "That so much of the judgment of the 6th of April, 1879, in this action as declares that the defendants, the owners of the *Cartsburn*, are not entitled to any contribution or indemnity against the third party Andrew Bain, or decides anything as between the said defendants and the said Andrew Bain, or gives directions consequential upon such declaration or decision, be struck out, and that the said Andrew Bain pay the costs of and incidental to this application." We are of opinion that to a considerable extent the motion ought to have been acceded to in the Court below, and ought to be acceded to here. We have arrived at that conclusion from these considerations, that there was no litis contestatio established, no issue joined, and no trial had as between the *Cartsburn* and the *Leader*, and therefore that any adjudication between them is erroneous as being coram non judice, and ought to be removed from the judgment.

The third party in this case was brought in under the usual notice given by leave of the Court, which after stating the object of the action, and that the defendants claimed indemnity from the owner of the *Leader*, proceeded: "And take notice that if you wish to dispute the plaintiffs' claim in this action as against the *Cartsburn* or the said defendants, you must cause an appearance to be entered for you within eight days after the service of this notice. In default of your so appearing, you will not be entitled in any future proceeding between the defendants and yourself to dispute the validity of the judgment in this action whether obtained by consent or otherwise." That evidently refers

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to a future proceeding which might be taken by the owners of the *Cartsburn* against the owner of the *Leader*, on the ground that, if the plaintiffs succeeded, that success was due to some fault of the *Leader;* but there is nothing in that notice, and there is nothing consequent on it, which amounts to a claim by the *Cartsburn* against the *Leader* for indemnity or otherwise. There was no claim, no action brought, and nothing equivalent to any action by the owners of the *Cartsburn* against the owner of the *Leader*, and nothing was done which could enable the *Cartsburn* to recover in the action. If the owners of the *Cartsburn* could not recover in the action, and could not obtain judgment against the the owner of the *Leader*, it seems to follow that the owner of the *Leader* could not have been entitled to any judgment as between him and the *Cartsburn*. So it stood upon the notice. Then when the owner of the *Leader* appeared in Court upon the notice, an order was made on the 28th of June, which was as follows: "The judge, having heard counsel for the plaintiffs and the defendants, owners of the *Cartsburn*, ordered that Andrew Bain, owner of the steam-tug *Leader*, be at liberty to appear and defend, being bound as between him and the said defendants by any decision the Court may come to in this action as to the cause of the collision." Now it probably was intended by that order to put the matter in course of investigation, not only as between the plaintiffs and the other parties, but as between the owners of the *Cartsburn* and the owner of the *Leader;* but the order did not proceed to do what was necessary to effectuate that intention. It was quite competent to the Court either to have directed the owners of the *Cartsburn* to have brought in a claim, or to have done something equivalent to bringing in a claim by which, when the matter had been disposed of as between the plaintiffs on the one hand and the owners of the *Cartsburn* and the *Leader* on the other, any subsequent question as between the owners of the *Cartsburn* and the owner of the *Leader* might have been put in course of investigation. But no such proceeding was directed, no issue was directed to be joined, no issue of fact was settled which was to be tried between those parties themselves after the plaintiffs' case had been disposed of, and the plaintiffs of course had a right to have their case finally heard and disposed of independently

of any consequential case which might have to be determined as between the owners of the *Cartsburn* and the *Leader*.

We think therefore that so much of the judgment as pronounced that the defendants the owners of the *Cartsburn* were not entitled to any contribution or indemnity against the owner of the *Leader* in respect of the said damages and costs, and as condemned the said defendants and their bail in the costs incurred by the co-defendant, must be struck out of the judgment as being a matter which was not properly before the Court for determination.

The appellants contended before us that we ought to go further, and under that part of the notice of motion which asks that whatever decides anything between the said defendants and Andrew Bain may be struck out of the judgment, we ought to interfere with that part of the finding which pronounces the collision in question in this action to have been occasioned solely by the fault or default of the master and crew of the *Cartsburn*. That declaration we are not in a condition to interfere with. It is a finding as between the plaintiffs and the defendants, and is the finding upon which the judgment against the *Cartsburn* is pronounced; and if there was anything wrong in that finding in point of fact, as being contrary to the evidence, or not supported by the evidence, or if there was anything wrong in the trial by which the judgment was arrived at, the only mode of obtaining relief from that would be by a regular appeal against the judgment, or by something in the way of a motion for a new trial. But it is as it stands a finding between the plaintiffs and the *Cartsburn*, and we cannot interfere with it in the absence of the plaintiffs, who are not before us. It is a judgment as between the plaintiffs and the defendants, the owners of the *Cartsburn*, and it was obtained in the presence, whatever may be the effect of it, of the owner of the *Leader*, who was called upon to intervene, and take part in the trial. Whatever may be the consequences of that under the circumstances is not before us for determination. The finding is a finding between the plaintiffs and the *Cartsburn* which we cannot alter, though we might strike it out; and it is to be observed that if the finding as to the cause of the collision is struck out, there is nothing to bind the *Leader* at all, because the only thing by which the *Leader* was to be bound was the decision

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of the Court in this action as to the cause of the collision. Therefore that part of the judgment must remain. We simply strike out the adjudication that the owners of the *Cartsburn* were not entitled to any contribution or indemnity, and the direction condemning them in costs, leaving the rest of the judgment as it stands. The whole difficulty arose apparently from some mistake or misapprehension of the Court as to what the meaning of the order of the 28th of June was, and we think there should be no costs upon either side either in the Court below or here.

Judgment accordingly.

Solicitors for the *Cartsburn*: *Fielder & Sumner.*
Solicitors for the *Leader*: *Clarkson, Son, & Greenwell.*

1879

Aug. 9.

[IN THE CONSISTORY COURT OF LONDON.]

THE VICAR, CHURCHWARDENS, AND PARISHIONERS OF ST. SEPULCHRE, LONDON *v.* THE CHURCHWARDENS, VESTRY, AND PARISHIONERS OF ST. SEPULCHRE, MIDDLESEX.

Faculty—Status of Churchwardens of a Parish divided into Two Divisions and having a Separate Vestry for each Division.

The parish church of St. Sepulchre is within the city of London, but the parish of St. Sepulchre is situate partly within the city of London and partly in the county of Middlesex, and five churchwardens of the parish church are annually elected, three by the vestry of the portion of the parish within the city of London and two by the vestry of the portion of the parish in the county of Middlesex. The vicar and the churchwardens elected by the city portion of the parish having petitioned the ordinary for a faculty to authorize certain repairs in the parish church, the churchwardens elected by the Middlesex portion of the parish appeared as opponents in the cause, and prayed the Court to direct the faculty, if granted, to issue to them jointly with the petitioners, and to declare what were the rights of the respective parties to the suit with respect to church management. It was admitted that the churchwardens elected by the city portion of the parish had for a long series of years had the sole control of a certain trust fund available for payment of the costs of the proposed alterations:—

Held, that the churchwardens elected by each portion of the parish were equally officers of the ordinary in all matters relating to the management of the parish church, and that a faculty must issue to the petitioners and the opponents jointly.

THIS was a cause of faculty instituted "on behalf of the Rev. James Jackson, vicar of the parish of St. Sepulchre, in the city

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and diocese of London, and the churchwardens of that part of the said parish which lies within the city of London." The petition to lead the faculty was dated the 28th of November, and alleged, inter alia, that in addition to certain repairs to the parish church, licensed by a certain faculty of the judge of this Court, dated the 20th of March, 1878, it was desirable and necessary that certain further repairs should be effected in the church; that there was a fund in the Court of Chancery applicable for the purpose of the said repairs; and that it was proposed to apply to the Chancery Division of the High Court of Justice for the necessary money out of such fund for the execution of the same. The petition then prayed that a faculty might issue to enable the petitioners and their successors to carry out the said repairs or such of the same as they might consider most necessary and expedient.

The site of the above-mentioned parish church of St. Sepulchre is within the city of London, but the parish of which it is the parish church is situate in part within the city of London and in part within the county of Middlesex. For each part of the parish there is a separate vestry, and the churchwardens of the parish church are five in number, of which number three are elected by the vestry of the portion of the parish within the city of London, and two by the vestry of the portion of the parish within the county of Middlesex, and disputes with regard to the repairs for which the petitioners proposed to obtain a faculty having arisen between the two vestries an appearance in the cause was entered on "behalf of the churchwardens, and also for the vestry and parishioners, of that part of the parish of St. Sepulchre which lies in the county of Middlesex," and on the 30th of December their solicitors brought in an answer containing objections on the merits to the issue of the proposed faculty. Subsequently proposals were entered into between the petitioners and the opponents to the effect that the churchwardens, vestry, and parishioners of St. Sepulchre, Middlesex, should withdraw the opposition to the issue of a faculty for certain of the alterations referred to in the petition on the understanding that as soon as the necessary sanction had been obtained by faculty

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certain specific works should be carried out in the parish church; that the parties to whom the faculty in the cause should issue, and all questions of costs, should be determined by the Court, and that the Court should be asked to define the rights of the respective parties as regarded church management.

On the 8th of March last, on the application of all parties, and after reading a memorandum of the above-mentioned proposals or terms of arrangement, the Court ordered that certain works in the parish church should be proceeded with; and that the order then made should be confirmed by faculty thereafter.

May 12. The case was called on.

It was admitted that the vicar and the churchwardens of the city portion of the parish for a very long time had had the sole control of the property, from which the fund referred to in the petition had been derived.

Dr. Deane, Q.C., and *W. G. F. Phillimore*, on behalf of the petitioners, prayed that a faculty should issue in accordance with the prayer of the petition in the cause, subject to the variations agreed upon by the proposals above mentioned, and that the costs of the petitioners, occasioned by the opposition to the petition, should be paid by the opponents.

A. J. Stephens, Q.C., and *Sutton*, on behalf of the opponents, prayed that the parish church should be repaired in accordance with the faculty of the 20th of March, 1878, referred to in the petition in the suit, or so near thereto as circumstances would admit, having regard to the proposed terms of arrangement, and that any faculty which the Court might think fit to grant should issue to the opponents jointly with the petitioners.

Dr. Deane, Q.C., in reply.

The nature of the arguments appear from the judgment.

Cur. adv. vult.

Aug. 9. DR. TRISTRAM. The petitioners in this case are the vicar of the parish of St. Sepulchre (which is situated partly within the city of London and partly in the county of Middlesex) and the three churchwardens elected by the vestry for the city portion

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of the parish. They ask for a further or supplemental faculty to authorize them and their successors to make certain alterations and to do certain restorations in their parish church not authorized by a previous faculty issued in April, 1878. The defendants are the two churchwardens elected by the Middlesex portion of the parish, who objected to some of the proposed alterations, and claimed to be joined in any faculty that the Court might issue. The larger portion of the parish lies within the city of London, and the smaller portion is in the county of Middlesex. Each division from the earliest times has had a separate vestry and separate churchwardens elected by their respective vestries. The churchwardens for the two divisions appear to have been five in number. In 1664 four were elected for that portion of the parish within the liberty of the city and one for that portion without the city. In the following century the city division appear to have elected three and the Middlesex division two churchwardens. For the two divisions of the parish there has been from early times only one place of divine worship, St. Sepulchre's church, situate on Snow Hill, in the city portion of the parish. The fabric of the church has been maintained in repair and the expenses attending divine service have been provided for from the income of certain property situate within the city portion of the parish, devised for that purpose (amongst others) by William of Newcastle by his will, dated 1338, to the vicar and four parishioners, wardens of the church of St. Sepulchre. As a matter of fact this property has for a very great length of time been under the sole control of the vicar and city churchwardens, and in all acts relating to it they have been treated as the sole devisees in trust of the same. From the parochial records it would seem that the city churchwardens having the control of this fund have taken frequently the exclusive and always the principal part in matters relating to the repairs and management of the church. In February, 1878, a petition signed by the vicar and the three city and two Middlesex churchwardens was presented to the Court praying that a faculty should issue to the petitioners to enable them and their successors to restore the church, according to a plan filed at the cost of 4500*l.*, which sum was to be provided out of the Newcastle fund. The

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petitioners applied by a proctor and the citation reciting the petition having duly issued, the Court issued a faculty in accordance with the prayer of the petition, but, inasmuch as the names of the churchwardens were not inserted in the faculty, it was contended on the part of the city churchwardens that the faculty in terms had issued to them, to the exclusion of the Middlesex churchwardens. There does appear to be some ambiguity in the wording of the faculty on this point, but it is contrary to the practice of the Court to exclude any of the petitioners for a faculty from a grant without notice to them, and it was certainly not the intention of the Court to do so in the present instance. I repeat what I said on a previous occasion that the ambiguity, if any, on the face of the faculty is cured by reference to the petition and citation, and I therefore hold that the Middlesex churchwardens are to be taken as parties to whom the faculty was granted. The city churchwardens, however, carried on the works contemplated independently of the Middlesex churchwardens, and during their progress it became necessary to take down the whole instead of a part of the galleries, for sanitary grounds to remove certain coffins which were immediately under the floor of the church, and to lower the flooring, and on removing the sub-arches under the tower a settlement was discovered in the tower. These further works having been commenced without the authority of a faculty, the Middlesex churchwardens applied to the Court to restrain the city churchwardens from departing from the faculty and for an order that they should act conjointly with them in carrying out the works. The vicar and city churchwardens therefore filed the present petition, and to this petition the Middlesex churchwardens filed an answer acquiescing in some, but objecting to others of the proposed works, and, after hearing evidence and counsel on the question, the Court suggested that as the differences between the vestries were not of serious importance they might, after conferring together, agree upon a plan which would meet with the approval of the Court, and for that purpose the further hearing of the case was adjourned.

A plan was agreed upon and embodied in a memorandum in writing, and approved of by the Court, and an order was issued

sanctioning the further restoration proposed in this plan. In the memorandum three questions were reserved for the consideration of the Court, viz., first, whether the faculty should issue to the Middlesex as well as to the city churchwardens; secondly, whether the Middlesex churchwardens were entitled to take any, and if any, what part in the management of the church, and, thirdly, as to costs.

It was argued by counsel for the Middlesex churchwardens, that the five churchwardens formed one corporation, and that the faculty ought to go to them in their corporate capacity and not to certain members of the corporation. It was argued on the other side, that there are recent instances in practice of faculties going to one churchwarden, see *Bradford* v. *Fry* (1), and that as the Middlesex churchwardens had heretofore taken no active part in the management of the church affairs they ought to be excluded from the faculty. The office of churchwarden is an ancient parochial office recognised by our common as well as by our ecclesiastical law, and by the first Act for the relief of the poor, 43 Eliz. c. 2, the churchwarden is ex virtute officii an overseer of the poor of the parish. A churchwarden is the officer of the ordinary, and it does not appear to the Court that the churchwardens of a division of a parish can be deprived of their official character or position by the circumstances of a private individual having left a fund to the churchwardens of another division of a parish sufficient for the repairs and expenses of the church, or by any disclaimer or neglect on the part of the churchwardens or vestry of such division. In the present case, moreover, all the five churchwardens have from early times been invariably admitted and sworn in as churchwardens of the parish, and have jointly, in such capacity made presentments at the visitations, relating to the church and church furniture. I am therefore of opinion, that the Court would not be justified in excluding the Middlesex churchwardens from the grant of the faculty if they are desirous of being joined in it with the city churchwardens. The decision of the King's Bench in *King* v. *Marsh* (2) is in accordance with this conclusion. In that case the parish of Berkeley in Gloucestershire,

(1) 4 P. D. 93. (2) 5 Ad. & E. 468

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was divided into four tithings: Berkeley Town, Alkington, Ham, and Hinton. An inhabitant of each tithing was chosen as one of the churchwardens at a vestry held at Easter for the whole parish, by the inhabitants of the tithing. There was one church in the parish and a chapel of ease in Ham. Each of the tithings had separate poor rates, and managed its poor separately. The four churchwardens were sworn in together at the archdeacon's visitation, faithfully to execute the office of churchwarden within their parish, and to present such things as were presentable, and none of the churchwardens acted out of his own tithing except in signing the general presentments. In ascertaining the boundaries between certain parts of the parish of Berkeley and an adjoining parish, it was necessary that certain notices should be given to one of the churchwardens or overseers of the poor of the respective parishes, omitting entirely any mention of the officers of districts, and a notice respecting certain lands in the tithing of Alkington had been served on the churchwarden elected by the tithing of Berkeley Town, and the question was whether this was a good service? The King's Bench held, that this was a good service, and Lord Denman, in delivering the judgment of the Court, laid down the following propositions in reference to churchwardens:

> Generally speaking, the churchwarden is peculiarly, and emphatically a parish officer. The nomination may be (not usually is) by a portion of, or even by a person in the parish; but the office is not thereby affected. He is still of and for the parish. We think that this may be considered as a somewhat unusual case of separate appointment, and separate acting, without affecting the proper and legal character of churchwarden. It may have been an arrangement for some purpose of real or supposed convenience. They are sworn in as for the parish; the acts before particularly alluded to are for the parish; the general and undoubted character of the office is for the parish.

It would, however, be inconvenient to confer power by the faculty on persons who are not trustees of the repair fund, to interfere actively with the works or contracts. As a matter of fact, the only fund disposable for the costs of the restoration, is at present vested in the city churchwardens, and they are the persons who would have to sign the contract for the works. The Middlesex churchwardens say they are equally trustees of the

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fund. The question who are the proper trustees, is a question for the determination of the Chancery Division of the High Court of Justice and not of this Court. The Court, therefore, proposes to issue the faculty to the city and Middlesex churchwardens in their capacity of churchwardens of the parish and to the city churchwardens in their additional character as present trustees of the Newcastle fund, and to other the trustees for the time being, of this fund with a proviso that the trustees shall not be interfered with by the Middlesex churchwardens in regard to the carrying on the works, unless the Middlesex churchwardens shall be declared by a competent Court to be trustees of the fund. If the city churchwardens deviate from the faculty, the Middlesex churchwardens can apply to the Court on the subject. It is convenient when the funds for carrying on the works are not in the hands of the churchwardens, that the person who furnishes the funds and signs the contracts, should be joined with the churchwardens in a faculty for restoring or repairing a church. This is done where a layman undertakes at his own cost to restore or rebuild his parish church. As to the second question, the Court is of opinion that the Middlesex churchwardens are, equally with the city churchwardens, officers of the ordinary in all matters relating to the management of their parish church and are entitled to a voice in the same. As to the remaining question of costs, it is to be borne in mind that the question whether a faculty shall issue for the restoration of, or any particular alterations in a church, is in the discretion of the Court, and that, whether there is or is not a division of opinion in the vestry on the subject, it is for the Court to determine as to the terms in which it shall issue. It is also to be borne in mind that the judge of a Consistory Court is the representative of the bishop of the diocese, and it seems only reasonable, that when there is a fair and honest difference of opinion as to what alterations shall be made in the parish church amongst the parishioners on a question such as the present, it should be open to either party to take the opinion of the bishop's Court on the subject, without being called upon to pay the costs of the opposite party.

Very nice and difficult questions have been raised in this case,

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in a great measure owing to the acts of previous vestries and to the manner in which their records have been kept, and on this ground I may follow Dr. Lushington's ruling in a similar case, that of *Braithwaite* v. *The Dean of Chichester* (1), and leave each party to pay their own costs. There may, however, be a parochial fund out of which the costs may be properly payable, and if a certificate from this Court that the costs incurred by both parties in the applications made in this case may fairly be charged on such fund would be of service to either party, the Court is prepared to give such a certificate. The Court will also order that the costs of both parties be paid out of any parochial fund in respect of which it may have jurisdiction to make such order. (2)

Solicitors for petitioners: *J. & M. Pontifex.*
Solicitors for opponents: *Robinson, Son, & Edwards.*

(1) 8 Jurist (N.S.) 1186.

(2) On the 3rd of September the Chancellor, on the application of the petitioners, directed that the entry of the decree of the 11th of August should be postponed until the first week of November.

[IN THE COURT OF APPEAL.]

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THE SIR CHARLES NAPIER. (1879 F. 208).

Wages—Set-off and Counter-claim—Loss of Ship caused by Negligence of Master —Payment by Underwriters—Amount payable on Total Loss.

In an action of wages by master against shipowner, the defendant, by way of set-off and counter-claim, claimed damages for the loss of the ship by the negligence of the plaintiff. Reply, that the ship was insured against a total loss, and that the underwriters had paid or agreed to pay to the owners the whole amount payable by them on a total loss:—

Held, on demurrer, that the reply was bad, because the plaintiff had not pleaded that the money had been actually paid to the defendant, or that the counter-claim had been brought without the authority of the underwriters.

ACTION by the master against the owner of the ship *Sir Charles Napier* for the recovery of wages and disbursements.

Set-off and counter-claim: that whilst the defendant was sole owner of the *Sir Charles Napier*, and the plaintiff was in command, the plaintiff so neglected his duty as master and conducted himself so negligently, that by his negligence the ship was wrecked and totally lost, and claiming damages for such loss.

Reply, inter alia, that the vessel was fully insured on behalf of her owners, of whom the defendant was one, by policies of insurance against a total loss, and became on the occasion mentioned in the counter-claim a total loss; that the underwriters paid or agreed and became liable to pay to the owners of the vessel, of whom the defendant was one, the whole amount of money payable by and in the policies of insurance in the event of a total loss, and that the defendant could not without the privity and authority of the underwriters maintain any set-off or counter-claim against the plaintiff in respect of the loss of the ship.

Demurrer.

Dec. 16, 1879. *E. C. Clarkson*, for the defendant. The allegations in the reply, even if they could be substantiated by evidence, would be no defence to the defendant's counter-claim. It was the invariable practice in the Court of Admiralty to allow the defendants in a cause of master's wages to set off any damages

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which had been sustained by them by reason of the plaintiff's negligence. Why should a different rule be applied since the passing of the Judicature Act? The counter-claim of the defendant arises out of his contract with the plaintiff. The negligence of the plaintiff is a breach of that contract. If the principle contended for by the plaintiff were to be upheld, underwriters must necessarily be made parties in nearly every action of damage in this court, but it is well known that they are never made parties in such actions, and indeed have no independent right of action, and cannot sue in their own names for damage to the property insured: *Simpson* v. *Thomson.* (1)

Hilbery, for the plaintiff. It must be taken as admitted upon this demurrer that the defendant is claiming the damages he seeks as a trustee for the underwriters, and that he has not any authority from them to maintain his counter-claim against the plaintiff. This being the case, it becomes obvious that the Court has no jurisdiction over the counter-claim. Whatever may have been the practice of the Court of Admiralty it is now provided by the 24th section of the Judicature Act, 1873, that the defendant in an action can only have such relief by way of counter-claim as ought to have been given in the Court of Chancery in a suit instituted before the passing of that Act. According to the principles administered by the Court of Chancery the defendant in the circumstances alleged in the reply would have been debarred from any counter-claim: *Bristowe* v. *Needham* (2); *London, Bombay and Mediterranean Bank* v. *Narraway* (3); *Clark* v. *Cort* (4); *Rawson* v. *Samuel* (5); *Watson* v. *Mid Wales Ry. Co.* (6) If the defendant has been paid or is entitled to receive the amount of the policies in this case, he is in the same position with regard to any damages for the loss of the ship he may recover from third parties as if such damages had been recovered by him as an executor of, or a trustee for the underwriters: *North of England Insurance Association* v. *Armstrong.* (7) [He also referred to the Rules of the Supreme Court, Order XVI., rule 7;

(1) 3 App. Cas. 279.
(2) 7 M. & G. 648.
(3) Law Rep. 15 Eq. 93.
(4) Cr. & P. 154.
(5) Cr. & P. 161.
(6) Law Rep. 2 C. P. 593.
(7) Law Rep. 5 Q. B. 244.

Order XIX., rule 3; Order XXII., rule 10; and *Fair* v. *M'Iver* (1); *Macdonald* v. *Carington*. (2)]

Clarkson in reply.

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SIR ROBERT PHILLIMORE. It appears to me that there is a fallacy running through the plaintiff's argument. It assumes that the claim made by the defendant for damages for the loss of his ship by the negligence of the plaintiff, is a claim made by the defendant in a representative capacity. Now I cannot see my way to decide that the claim made by the defendant by way of set-off and counter-claim is a claim by him in any other capacity than that of a shipowner, the same capacity in which he is sued. Some confusion seems to have arisen from the proper distinction not having been drawn between what was a matter of set-off before the Judicature Act, and what may now be included under counter-claim. Several cases have been cited in support of the proposition that the defendant is not entitled to claim by way of counter-claim any damage in a representative capacity, and I do not indeed understand that the principle involved in these cases is disputed; but it has been contended, and I think rightly contended, on behalf of the defendant, that they are not applicable in a case like the present case, where the set-off or counter-claim arises out of the personal contract between the master and the shipowner. I must sustain the demurrer with costs.

Judgment for the defendant.

From this judgment the plaintiff appealed. The appeal was heard on the 25th of February, 1880.

Hilbery, for the plaintiff.

E. C. Clarkson, for the defendant, contended that the reply did not allege that the money had been paid to the defendant by the underwriters, but only that they had paid or agreed to pay it. This ought to be taken as against the pleader—that the money had not yet been paid, and therefore that the relation of trustee had not been constituted. Nor was there any distinct allegation that the counter-claim was brought without the privity of the underwriters.

Hilbery, in reply, submitted that the allegations in the reply

(1) 16 East, 130. (2) 4 C. P. D. 28.

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were sufficiently distinct; but if the Court should be of a contrary opinion, he asked leave to amend.

JESSEL, M.R. This is an appeal from a decision of Sir R. Phillimore allowing a demurrer to a portion of the reply. I am very loath to allow demurrers of this description, which do not go to the merits of the action, and only raise subsidiary questions. Still it is our duty to decide the question which is brought before us. This being an action against the owner of a ship for wages earned by the master, the defendant raises a defence and counter-claim on the ground that the vessel was lost by the plaintiff's negligence. To this set-off and counter-claim the plaintiff replies that the owner was fully insured, and that as he is entitled to recover his loss from the underwriters, the loss is no defence to the action for wages. And he says that he is entitled to judgment personally against the defendant, but that the defendant, if successful, would not be entitled to judgment for himself but on behalf of the underwriters for whom he is a trustee; so that there would be two judgments, and not one only as required by Order XIX., rule 3, and Order XXII., rule 10. If the pleading had sufficiently alleged the facts, I might have thought there was force in the plaintiff's contention; but in the pleading there is no allegation of the fact of payment by the underwriters. The allegation is, that the underwriters "have paid or agreed and become liable to pay" to the owners the whole amount payable under the policies of insurance, and as the pleading must be taken in the sense least favourable to the pleader, it does not appear that the defendant has lost his right of action against the plaintiff, for it is not shewn that the relation of trustee and cestui que trust has actually arisen between the defendant and the underwriters.

Another defect in the pleading is, that it is not distinctly alleged that the counter-claim was brought without the privity or authority of the underwriters. It must also be borne in mind that a set-off and counter-claim are not the same thing, and that a matter may be an answer to one but not to the other. I am therefore of opinion that the judgment of Sir Robert Phillimore allowing the demurrer must be affirmed with costs.

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With respect to the application for leave to amend, if the plaintiff should be prepared with an affidavit that the defendant has actually received the money, and that the counter-claim was made without the authority of the underwriters, he may be allowed to amend.

JAMES and COTTON, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiff: *F. W. & H. Hilbery.*
Solicitor for defendant: *Wynne.*

[IN THE COURT OF APPEAL.]

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THE CONSETT (1877 R. 376).

Practice—Action of Damage by Owners of Ship and Owners of Cargo—Costs of Reference.

The costs of the reference as to damages in an action of damages do not follow the costs of the action, but are in the discretion of the judge as the costs of a fresh litigation.

Where, therefore, an action had been brought by the owners of a ship and the owners of the cargo against another ship for collision, and both ships had been held to blame, and the judge afterwards gave the plaintiffs the owners of the cargo the costs of the reference, the Court of Appeal refused to interfere with his order.

APPEAL from an order of the Judge of the Admiralty Court, Sir R. Phillimore. (1)

The action was brought by the owners of the ship *Jessore*, her master and crew, and the owners of her cargo, against the steamship *Consett* claiming damages for a collision between the two ships. The judge held that both ships were to blame, and that the damage must be borne equally by the owners of the two ships; and directed the usual reference, but made no order as to costs.

The plaintiffs accordingly took in their claims, which were supported by affidavits, and the registrar reported, inter alia, that the owners of the cargo of the *Jessore* ought to be allowed 15,094*l.* 2*s.* 10*d.*, but he made no report as to how the costs of the reference ought to be borne.

The owners of the cargo of the *Jessore* then moved the judge in

(1) 5 P. D. 52.

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court to order the costs of the reference and of their affidavits to be be paid by the owners of the *Consett*, and his Lordship made the order asked for; but gave leave to the defendants to appeal from his decision.

The defendants accordingly appealed.

E. C. Clarkson (*Webster, Q.C.*, with him), for the defendants. The same rule ought to be followed in the reference as to the amount of damages as at the trial of the action, and no costs ought to be allowed to the owners of the cargo any more than to the owners of the ship which carried it: *The Hibernia.* (1) It is true that in the case of *The City of Manchester* (2) the Judge of the Admiralty Court acted on a different rule, and gave the owners of the cargo costs of the action, but that decision was contrary to the principle usually followed in the Court of Admiralty.

Butt, Q.C., and *Myburgh*, for the plaintiffs, were not called on.

JESSEL, M.R. I think that this appeal cannot succeed. Under the Judicature Act the costs are subject to the discretion of the judge, that is, of course his judicial discretion. When the trial takes place and there are cross claims, and both parties claim the full amount of damages, and the judge holds both to blame, he may well act upon the rule that there shall be no costs. But the investigation before the registrar is a new litigation. It may be stopped at the outset by the defendants tendering a reasonable sum, or it may be carried on to the end and great expense incurred, and the judge will exercise his discretion as to the costs just as if, instead of a reference, there had been a fresh action on the judgment. He may make the defendants pay all the costs, or he may say that the plaintiff's claim has been unreasonable and extravagant and refuse to give any costs. In any case the costs are in his discretion as in a fresh litigation. In this case he has exercised that discretion, and we cannot interfere with it. Therefore the appeal must be dismissed with costs.

JAMES and COTTON, L.JJ., concurred.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Rawle.*
Solicitors for defendants: *Cooper & Co.*

(1) 2 Asp. Mar. Law Cas. 454. (2) 5 P. D. 3.

SANTO TEODORO *v.* SANTO TEODORO. 1876 *May* 24.

English Marriage—Foreign Husband—Stipulation for an English Residence by Wife—Jurisdiction of Court.

An English lady consented to marry the eldest son and heir of a Neapolitan nobleman, on condition of their always having, after marriage, a residence in England, and of their residing there six months, at least, in each year. The marriage was celebrated in August, 1854, in England. There were five English trustees of the marriage settlements, which contained a proviso that they should be construed according to the law of England. A few months after the marriage a London residence was taken and furnished by the parties, which they occupied for six months in each year, with two or three exceptions, from 1855 to 1872, living for the remainder of the year in apartments in the palace of the husband's father, at Naples, or at other places on the continent. In 1872, the lady separated from her husband in consequence of his cruelty and adultery, and she continued up to the hearing to reside in their London residence.

In 1873 the husband's father died, when he succeeded to his title and estates and palace at Naples, and since then he had resided sometimes at Naples, but principally at other places on the continent. The petition and citation were served on the husband at Paris, and he had entered no appearance:—

Held, that the Court had jurisdiction to dissolve the marriage.

This was a petition by the Duchess de Santo Teodoro, of 36, Lowndes Street, Hyde Park, London, for a dissolution of her marriage with the Duke de Santo Teodoro, a Neapolitan nobleman, by reason of his adultery and cruelty.

The petition and citation were served on the respondent in Paris, and he had entered no appearance.

Dr. Spinks, Q.C., and *Dr. Tristram*, for the petitioner.

Dr. Spinks, Q.C., in opening the case, after stating shortly the facts he should prove, directed the attention of the Court to the fact that the respondent was a Neapolitan nobleman, and that as his property and his palace were in Italy, and as since the petitioner separated from him in 1872, owing to his marital misconduct, he had resided at Naples, but principally at other places on the continent, he could not be said to have now an English domicile or residence. The petitioner, however, was an English subject and only agreed to marry the respondent on his promising that

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they should have a permanent residence after marriage in England, and should reside in England six months in the year at least. The marriage was celebrated in England with a view to such residence in England. The stipulation as to residence had been adhered to from 1855 up to their separation in 1872, and since that time the petitioner had continued to reside in their English home. There was also a proviso in the marriage settlements that they should take effect and be construed as English settlements. The circumstances requisite to give the Court jurisdiction to dissolve an English marriage, and to establish a testamentary domicile were not the same: *Brodie* v. *Brodie* (1), and he should submit that the facts of the case were quite sufficient to warrant the Court in pronouncing the decree prayed for.

The material facts proved were as follows: The petitioner was the only child and heiress of Captain Locke, of Norbury Park, Surrey, an officer in the Life Guards, who died shortly prior to her birth.

The petitioner became a ward of the Court of Chancery in England, and was brought up in England and on the continent by her mother, Mrs. Locke, who was a daughter of Admiral and Lady Elizabeth Tollemache, of Helmingham, in Suffolk. In 1849 she married Lord Burghersh, who died in 1851. On his death the petitioner, being still a minor, again became a ward of the Court of Chancery in England. In 1853, being with her mother on a visit to Naples, she met there the respondent, then the Marquis Caracciolo, who was residing with his father, the Duke de Santo Teodoro, at Naples. The petitioner's fortune amounted in value to about 120,000*l.*, and she was also entitled to a jointure of 1000*l.*, a year, charged on Lord Westmoreland's estates. The respondent was at this time dependant on an allowance of 1000*l.* a year paid to him by his father. The respondent made her an offer of marriage, which she accepted, but subject to the condition that she should always have her home in England, and should reside there six months in the year, to which he at once assented. His assent to this condition was proved by both the petitioner and Mrs. Locke.

(1) 2 Sw. & Tr. 263.

The petitioner returned to England, and nine months after her return, namely, on the 31st of August, 1854, the marriage was celebrated, first at the Roman Catholic Church in Cadogan Place, London, and, subsequently, on the same day, at St. James' Church, Piccadilly.

Just before the marriage the respondent and Mrs. Locke were engaged in looking out for a London residence, but were unable to meet with one to suit them until after the marriage.

There were two ante-nuptial settlements executed by the petitioner and respondent, of which Lord James Butler, Lord Dungarvon, the Right Honourable Cowper Temple, Mr. Charles Pascoe Grenfell, and Mr. Henry Greville were trustees, by one of which the respondent engaged to charge certain estates in Italy, which would devolve on him at his father's death, with the payment of an annuity of 500*l.* to the petitioner in the event of her surviving him, and by the other, the first life income of the petitioner's property was made payable to the respondent for life, subject to the payment of 1000*l.* a year and of her jointure to the petitioner for her separate use. There was a clause in the settlements, "that the provisions in the deed charging the Italian property, and the provisions as to the trustees contained in the deed settling the petitioner's property should be construed according to the laws of England, and the meaning which would be given to the same in England."

After the marriage the petitioner and respondent went abroad for the winter, and in the following year, 1855, they returned to England, when a house, 36, Lowndes Street, Hyde Park, was by an arrangement between them and Mrs. Locke (who lived with them) taken as their home in England. The Duke and Duchess furnished the house, and from 1855 to 1872 paid half the rent, the rates and taxes, and contributed more than their respective shares towards the other household expenses. During these years (with two or three exceptions), the petitioner and respondent resided in this house for about six months in each year, and spent the remainder of the year in apartments at the respondent's father's palace at Naples, or at other places on the continent.

In 1859, and subsequently, the respondent treated the petitioner

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with cruelty. Early in 1860, whilst they were staying at Naples, he acted towards her with great violence, and threatened to place her in a convent, and she, having ascertained that by the then Neapolitan law he had power to do so, and being apprehensive of his putting his threat into execution, application was made through her friends to Lord Palmerston, who was then Prime Minister, to give her, as a British subject, protection, and his lordship thereupon instructed the British Minister at Naples to give her refuge as an English subject at the British Legation. She took refuge there, and remained there under the protection of the British flag for three months. Whilst there some gendarmes were sent to take her away, but the British Minister refused to give her up. After remaining there for three months she resumed, through the intervention of friends, cohabitation with her husband, and lived with him until 1872, when she left him in consequence of his unkindness and threats, and more particularly in consequence of his having formed an improper intimacy with an opera singer, with whom adultery was charged. She had since continued to reside at 36, Lowndes Street, Hyde Park, and the respondent had resided apart from her at different places on the continent.

The respondent's father died in 1873, when he succeeded to his estates in Italy, and to his palace at Naples. Between 1871 and the date of the petition he had committed adultery with the opera singer at Naples, Milan, and Paris.

The petitioner gave evidence as to her family, her position and fortune, that she accepted the respondent on the condition of their having an English home, and that she always resided there for six months in the year, that the marriage was celebrated in England, and the house No. 36, Lowndes Street, Hyde Park, taken for them in 1855, that they furnished it, and shared with Mrs. Locke the larger proportion of the expenses of the establishment, and resided together there for about six months in the year from 1853 to 1872, with two or three exceptions, and that she had continued to reside there, separate from her husband, ever since.

SIR R. J. PHILLIMORE interposing, said, I am quite satisfied at present, that the duke is subject to the jurisdiction of the Court.

Dr. Spinks, Q.C., also produced the marriage settlement, and referred the Court to the clause in it providing that it should be construed according to the laws of England.

SIR R. J. PHILLIMORE. The contract is made in England, there is a long cohabitation in England, the husband has been served.

The petitioner having proceeded with and concluded her evidence, Mrs. Locke corroborated her, and other witnesses were examined in support of the charges of cruelty.

The depositions of witnesses taken on commission at Naples, Florence, Milan, and Paris, were put in and read, proving the respondent's adultery at those places.

SIR R. J. PHILLIMORE. The petitioner's counsel I do not think I need trouble further. The evidence of adultery is plain and indisputable. The evidence in regard to cruelty requires more consideration; but on the whole I am satisfied that the cruelty was of that kind which the law requires in order to give a wife the right of separation from a husband, viz., that it rendered cohabitation unsafe and insecure. That cruelty was condoned by a subsequent cohabitation of the duchess with her husband, but it has been revived by subsequent adultery, which is proved beyond all doubt. The petitioner in this case is entitled to a decree nisi, with costs, against her husband.

Solicitors for petitioner: *Baxters & Co.*

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Dec. 4, 5.

SMEE AND OTHERS *v.* SMEE AND THE CORPORATION OF BRIGHTON.

Will—Capacity—Delusions—Burden of Proof.

A man may be capable of transacting business of a complicated and important kind, involving the exercise of considerable powers of intellect, and yet may be subject to delusions so as to be unfit to make a will.

But if the delusions under which a man labours are such that they could not reasonably be supposed to have affected the dispositions made by his will, the will would be valid.

Banks v. *Goodfellow* (Law Rep. 5 Q. B. 549) followed.

The burden of proving capacity to make a will rests upon those who propound the will, and, à fortiori, when it appears that the testator was subject to delusions.

THE defendant, the widow of William Ray Smee, deceased, propounded a will dated the 21st day of June, 1859, of the deceased, and the other defendants propounded a later will of the 12th day of April, 1867. The plaintiffs alleged that the deceased was not of sound mind, memory, and understanding at the date of execution of either of the wills.

The deceased was for many years secretary to the committee of treasury of the Bank of England, and in November, 1852, met with a severe railway accident, in consequence of which he, in 1854, resigned his appointment. In the same year he married the defendant Mrs. Smee. By the will of 1859 he left his property, subject to the payment of some small legacies, to his wife absolutely, and named her sole executrix; and by the will of 1867 he gave her the property for life or widowhood, and devised and bequeathed the residue to the corporation of Brighton towards forming a public library in the Royal Pavilion at Brighton. The deceased managed his own affairs down to the time of his death, and took an active part in politics, and amongst other things wrote an able pamphlet on the repeal of the malt tax. He had been left by his father a life interest in a sum of 18,000*l.*, and it appeared that in the early part of February, 1859, if not sooner he was labouring under insane delusions as to this and other matters. The following is one of the memorials prepared and sent by the deceased, which illustrates the character of the delusions:—

"To Her Most Gracious Majesty Victoria, Queen of Great

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Britain and Ireland.—The humble memorial of William Ray Smee, of No. 2, St. Edmund's Terrace, Regent's Park, London, sheweth,—

"1. Until a very recent period your memorialist thought himself to be the eldest child of Mr. William Smee, of the Bank of England, and his conduct as a son was dutiful, considerate, and affectionate.

"2. Memory, however, has now brought a knowledge of circumstances which renders this supposed parentage more than doubtful, and induces him to think he is in some way connected with your Majesty's family.

"3. Your memorialist, when quite young, remembers walking with Master Alfred Smee and the nurse. There was a crowd of people looking at some show. They all at once turned to her, and demanded to know which was the prince, and on being told your memorialist, they escorted him home with loud hurrahs.

"4. King George IV. came to see your memorialist when living at Camberwell. He was but a little boy. The king walked into the parlour from the garden. His Majesty took a chair, balanced it on one leg, looked under, round, and up and down the chair, then fixing his eyes upon him, said, after a little pause, somewhat contemptuously, 'What do you call this?' 'A chair.' The king, still keeping his eyes fixed, replied, 'This thing a chair; a chair, do you call it?' Astonished, your memorialist asked, 'Can you not sit upon it?' The king seemed moved, did not again speak, but sat down, took him upon his knee, and heard him read. Some time afterwards Mrs. Smee came in, when the king with much feeling patted your memorialist upon the head, and said, 'Poor boy, poor boy, get on with your learning; a great destiny is preparing for you, although you do not know it.'

"5. Your memorialist at this period was remarkable for the quickness and rapidity with which he acquired knowledge. He was at the top of the school, and at the end of the half-year all the boys escorted him in triumph. The master said he had never met with a boy more full of promise.

"6. When your memorialist became about eleven years of age his proficiency at school ceased. Every morning Mr. William

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Smee administered to him drugs that made him very sick, and during the day deprived him of his proper quantity of nourishment, and prohibited him from eating any animal food.

"7. When this conduct first commenced, a lady spoke to your memorialist as he was standing in the road opposite his house. Her kind words and manner are now distinctly remembered; she asked him whether he had enough to eat. He wished to screen Mr. William Smee, and did not like to tell a stranger how sadly he was treated, and replied he had. But on leaving her, felt very sorry for what he said.

"8. This concealment, so kindly meant, was most of all disastrous to your memorialist, as he then received less and less, lost his memory and strength, and became half an idiot; subsequently more food was given him, and he partly recovered; yet, when again sent to school he was a totally changed boy, very nervous, and learning very slow.

"9. When about thirteen years of age your memorialist came to live in the Bank of England, and he was again drugged with medicines administered by Mr. William Smee. At school he sat for weeks doing nothing, and your memorialist remembers a visit from a gentleman (and although not certain, yet he thinks he was addressed as Sir Henry Alford), who heard him read, and who appeared satisfied on finding he could not comprehend what he read. Yet this gentleman seemed anxious and uncomfortable, and said the memory, artificially taken away, might come back, and if so he was ruined.

"10. Within six months of this period he was called away from school to be introduced to a gentleman whom Mr. William Smee merely called 'a great man.' Your memorialist met him in Finsbury Circus, and all three walked up and down there, and the 'great man' asked all sorts of questions about him in his presence. He was dressed not like a gentleman but a well-to-do mechanic. On a sudden, the 'great man' exclaimed, 'I am discovered; see if the gentleman just past turns back.' He turned, 'I must be off,' he said, 'I must not be seen again,' and he disappeared, walking at a very rapid pace. Your memorialist now remembers much of the conversation, and regrets to say the great man in the mechanic's dress had the well-known face of the Duke of Wellington.

"11. About a year from this time a gentleman called upon your memorialist and said a sum of money was coming to him, and required him to appoint a trustee. With great form, Mr. William Smee was appointed; but your memorialist has never received either principal or interest, and there is no mode of getting it except by public trial, and it may be better to go without even a very large sum of money than bring these circumstances before the world.

"12. Your memorialist, thus continually drugged and deprived of his fortune, became at seventeen years of age a mere tool in the hands of Mr. William Smee,—made completely ignorant of the past; and all his ideas and previous views in life have been thus taken away, and he was compelled to accept a situation in Mr. Smee's department of the Bank of England.

"13. When eighteen years of age, Mr. William Smee came quite excited to our memorialist and said, 'There is a report a prince is a clerk in my department, and he is employed in the annuity office.' Your memorialist observed he was engaged in that office, and should be glad to know his name. Mr. William Smee seemed embarrassed, and made no answer. That evening he was again drugged, and until a few days ago all knowledge of the circumstance was obliterated.

"14. Thus was your memorialist made like a youth born at eighteen years of age. His mind a blank, yet it became a creative mind, and even then, if left alone, he would have made friends and would have risen in the world. But this was not permitted, and your memorialist constantly found himself thwarted by some unknown hand. Many instances of this could be mentioned. Two schemes of public importance, which required two Acts of Parliament to complete them, were suppressed, and the only reason your memorialist had given him was that they would not be allowed to go before the House of Commons with his name attached.

"15. About seven years ago your memorialist met with a railway accident, which made him very ill, and compelled him to give up his situation as Secretary to the Committee of Treasury at the Bank of England, and obliged him to live much in the country. It, however, caused blood to flow from the head, and this has, at length, so far relieved the brain that memory, which

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it was thought might return, has actually done so. Mr. William Smee was perfectly aware this result might happen, for four years before his death, when walking with him, he said, as if thinking about it, 'As soon as I perceive he knows I shall die.'

"16. Mr. William Smee in his last illness, when alone with your memorialist, made many strange remarks, three of which ought to be mentioned. First, he said, every trouble experienced by him has been made to happen by deep design for a great object. Second, that the railway accident would cause him to become abler and better than he had ever been for reasons he knew nothing about. Here Mr. William Smee paused and seemed absorbed in thought. After a few minutes he addressed your memorialist thus,—'William, you are a man of the highest character, and I now perceive this knowledge cannot be kept from you.' Third, and, wonderful to relate, one morning, Mr. William Smee, with a manner and a look that can never be forgotten, exclaimed—these are his exact words—'Extraordinary and unheard of means have been adopted to keep him down, or he must have come to the throne.'

"17. These observations would indicate that disease and great age had impaired the faculties of Mr. William Smee. Your memorialist tried to establish this, as he wished to upset the will made at this period. But all those who had opportunities of judging were of opinion his mind was even clearer and stronger than before his illness.

"18. Your memorialist is a person probably not unlike your Majesty's family. In Paris on two occasions he was told he belonged to the Royal Family of England, and his denial was hardly believed. Even in London he has more than once been taken for the Duke of Cambridge.

"19. Throughout life your memorialist has been distinguished by good temper, kindness of disposition, and a certain bonhommie; but the foregoing circumstances, the knowledge of which has only come very gradually within the last few days, have greatly pained and wounded him, neither has he any means of ascertaining whether everything is yet known to him.

"20. Your memorialist is now about forty-three years of age, and although he hopes now to become, with respect to his brain,

like other men, yet he is in very delicate health and has a sensitive mind.

"Your memorialist, therefore, humbly prays your Majesty to be graciously pleased to take some notice of him, and to cause the remainder of his days to be passed in honour and amid the charms of the best society; and your memorialist, as in duty bound, will be for ever grateful.

"William Ray Smee.

"December 22, 1859."

After the memorial to her Majesty became known to his family, and his claims upon his father's property as a trust fund for him were treated lightly by them, the deceased kept aloof from them, and his nephew stated that in an interview which he had with the deceased in March, 1877, the deceased stated in respect of the imaginary trust fund that it would be found at the Bank of England after his death. In the box which contained the will of 1867 were also found copies of the memorial in the deceased's handwriting.

Dr. Deane, Q.C., Searle, and *Rigg,* appeared for the plaintiffs.
Sir H. S. Giffard, S.G., Grady, and *Bayford,* for Mrs. Smee.
Inderwick, Q.C., and *Finlay,* for the Corporation of Brighton.

THE PRESIDENT, in summing up the case to the jury, said:—

The period of the testator's life with which you have to deal is from 1852 down to 1867, the period within which he made the two wills in question.

In 1852 he met with the accident on the railway, but the consequences of that accident, grave as they were, do not appear to have manifested themselves for a considerable time afterwards. He married in 1854, and it has not been suggested that he was not at that time capable of contracting marriage. In 1858 his father died. Whether his father's death had anything to do with exciting the morbid condition of his mind does not appear, and is immaterial to the inquiry, but upon that occasion he manifested delusions which it is not disputed possessed his mind from that time forward—it is said even down to his death; at any rate, long after 1867.

It is important to bear in mind the nature of the deceased's

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delusions. He had an idea that he was the son of George IV.; that when he was born a large sum of money was placed in his father's hands in trust for him; that he was robbed by his father by the diversion of a large part of that trust fund from him to his brothers; and that all that his father really had to give to his brothers was a sum of 1000*l.* each, the rest of the property (about 50,000*l.*) left by his father and divided by will between his children, being part of the imaginary trust fund, to which the deceased believed he alone was entitled.

He made a will in June, 1859, and a later will in April, 1867. By the later will, with which you have first to deal, he left his property to his wife for life, and after her death to found a free public library for the use of the people of Brighton. The question is whether that will can be deemed to be the will of a sane man.

The law on the subject is this. The fact that a man is capable of transacting business, whatever its extent, or however complicated it may be, and however considerable the powers of intellect it may require, does not exclude the idea of his being of unsound mind. A man may be a good carpenter, and yet his mind be tainted with insanity to such an extent as to render him irresponsible for a crime on the ground that he did not know the nature of the act. A very few years ago there was a man in Bethlehem Hospital who had been acquitted of crime as being insane, but who painted pictures of considerable value. His insanity in no way interfered with his skill as a painter. All the arguments, therefore, addressed to you on the subject of the testator's capacity to deal with complex subjects, to write pamphlets, and to make calculations, have nothing to do with the question whether or no he was of unsound mind with reference to the making of his will. He was admittedly of unsound mind, as shewn by that which is a most conclusive symptom and evidence of it, namely, the presence of delusions—that is to say, ideas which you cannot conceive any rational man to entertain.

Then arises another question, as to which undoubtedly there has been a difference of opinion between eminent authorities. A few years ago (1) it was generally considered that if a man's mind were

(1) See *Waring* v. *Waring*, 6 Moo. P. C. 341; *Smith* v. *Tebbitt*, Law Rep. 1 P. & D. 398, and cases there cited.

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unsound in one particular, the mind being one and indivisible, his mind was altogether unsound, and therefore that he could not be held capable of performing rationally such an act as the making of a will. A different doctrine subsequently prevailed, and this I propose to enunciate for your guidance. It is this. If the delusions could not reasonably be conceived to have had anything to do with the deceased's power of considering the claims of his relations upon him and the manner in which he should dispose of his property, then the presence of a particular delusion would not incapacitate him from making a will.

But you should specially bear in mind that any one who questions the validity of a will is entitled to put the person who alleges that it was made by a capable testator upon proof that he was of sound mind at the time of its execution. The burden of proof rests upon those who set up the will, and, a fortiori, when it has already appeared that there was in some particular undoubtedly unsoundness of mind, that burden is considerably increased. You have, therefore, to be satisfied from the evidence that has been offered by those who propounded the will of 1867, and the earlier will also, that the delusions under which the deceased laboured were of such a character that they could not reasonably be supposed to affect the disposition of his property.

This is an extremely delicate and difficult investigation, and may be illustrated by reference to the physical world. There might be a little crack in some geological stratum of no importance in itself, and nothing more than a chink through which water filters into the earth; but it might be shewn that this flaw had a direct influence upon the volume, or colour, or chemical qualities of a stream that issued from the earth many miles away. So with the mind. Upon the surface all may be perfectly clear, and a man may be able to transact ordinary business or follow his professional calling, and yet there may be some idea through which in the recesses of his mind an influence is produced on his conduct in other matters. You have to say whether or not the flaw or crack in the testator's mind was of such a character that, though its effect may not be seen on the surface of the document before you, it had an effect upon him when dealing with the disposition of his property, and making the bequest to the Corporation of

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Brighton. He had an idea that he was the son of George IV., and it is for you to say whether that idea might not have had an effect upon his mind when he was considering what he should do with his property? It is perfectly clear that the testator was thoroughly of unsound mind in one particular, and it is for you to say whether the character of his unsoundness does not shew a possibility and probability of connection between his will and the delusions under which he suffered, namely, that he was connected with the man who had taken such deep interest in the town of Brighton. Unless your minds are satisfied that there is no reasonable connection between the delusion and the bequests in the wills, those who propound the wills have not discharged the burdens cast upon them, and your verdict must be against them. The case is different, but only in degree with regard to the earlier will, as that will, being in favour of his wife, appears to be unconnected with his delusions. The capacity required of a testator is, that he should be able rationally to consider the claims of all those who are related to him, and who, according to the ordinary feelings of mankind, are supposed to have some claim to his consideration when dealing with his property as it is to be disposed of after his death. It is not sufficient that the will upon the face of it should be what might be considered a rational will. You must go below the surface and consider whether the testator was in such a state of mind that he could rationally take into consideration, not merely the amount and nature of his property but, the interest of those who by personal relationship or otherwise had claims upon him.

In dealing with the matter you must consider the testator's relations with reference to his brothers. He believed that they had by the fraud of his father been put in possession of two-thirds of property which belonged to him. His brother Alfred, in a letter in reply to one from the testator, in which the claim was first hinted at, treated the matter somewhat lightly, and it appeared from the evidence of Mr. Alfred Hutchinson Smee that there was in consequence a coolness between them, and that for many years they ceased to visit each other. If that were the state of his mind, believing that he had been defrauded by his brother of two-thirds of a sum of about 50,000*l.*, it will be for

you to say whether his delusion can be treated as wholly unconnected with the will, in which he left all of his property to his wife for life and nothing under any contingency to his brothers or sisters. The subject as I have said is difficult and delicate, but it is one of which I have no doubt the best solution is to be found by the verdict of a jury. It being conceded that the testator was undoubtedly of unsound mind, are you satisfied that when he made either of the wills he was capable of dealing with the subjects before him entirely free from the delusions under which he suffered? If the evidence does not satisfy you as to this, your verdict should be against the will.

The jury having found that the deceased was not of sound mind when the wills were executed, his lordship pronounced against both wills and allowed the costs of the plaintiffs and widow only out of the estate.

Inderwick, Q.C., asked for the costs of the corporation of Brighton also.

THE PRESIDENT. I am of opinion that the corporation of Brighton cannot be considered to blame for having raised the question as to the deceased's sanity. But that is not sufficient to entitle them to costs. I cannot allow them their costs, but I do not condemn them in costs.

Solicitor for plaintiffs: *T. H. Devonshire.*
Solicitors for corporation of Brighton: *Tilleard & Co.*
Solicitor for defendant: *J. Anderson Rose.*

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Aug. 6.

Marriage—Different Domiciles—Lex loci contractus.

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The validity of a marriage in England must, though the domicile of one of the parties may be foreign, be decided according to the law of England.

Marriage is based upon the contract of the parties, but is a status arising out of the contract to which each country is entitled to attach its own conditions, both as to its creation and duration.

G. B., a Portuguese, but domiciled in England, married in England I. S. a Portuguese lady, domiciled in Portugal. They were first cousins, and by the law of Portugal first cousins are, except by dispensation from the Pope, incapable of contracting marriage:—

Held, by the English Divorce Court, that the marriage was lawful:—

Held, also, that ignorance of the parties, as to the effects of Portuguese law upon the validity of the ceremony, could not affect the validity of the marriage.

THE facts of this case and the arguments of counsel are set forth in the judgment.

Inderwick, Q.C., and *Bayford*, appeared for the petitioner.

Sir J. Holker, A.G., Willis, Q.C., Gorst, Q.C., and *Jacques*, for the Queen's Proctor.

After the hearing and arguments of counsel the Court took time to consider its judgment.

Aug. 6. THE PRESIDENT. In this suit the petitioner prayed that her marriage with the respondent might be declared null and void, on the ground that she and the respondent were natives of Portugal, and at the time of the marriage domiciled in Portugal, that they were natural and lawful first cousins, and that, according to the law of Portugal, first cousins are incapable of contracting marriage on account of consanguinity.

The respondent entered an appearance, but did not file any answer.

The case came on for hearing before Sir R. Phillimore, who directed that the papers should be sent to the Queen's Proctor, in order that he might, under the direction of the Attorney-General, instruct counsel to argue the question whether the petitioner had shewn a sufficient ground for a decree of nullity.

First. By reason of the incapacity of the parties to contract marriage in 1866.

Secondly. By reason of fraud.

Thirdly. By reason of the petitioner's want of intention to contract a marriage, and of her ignorance of the effect of the ceremony.

On the 7th of November, 1876, the Queen's Proctor obtained leave to intervene in the case, and filed pleas.

On the 30th of January, 1877, it was ordered by consent of the parties that the questions of law referred to the Queen's Proctor for argument be heard before the questions of fact, without prejudice to either party.

The case accordingly came on for argument before Sir R. Phillimore on the 17th of March, 1877, when the learned judge stated that he was satisfied that the petitioner perfectly understood she was about to contract a marriage, and that it could not vitiate the marriage that she had an erroneous view of its future consequences, and refused to set it aside on the ground of incapacity, of age, or collusion, or fraud; and further held that the marriage having been contracted in England, and being valid by English law, could not be declared null on the ground that the parties were incapacitated from entering into it by the law of Portugal.

The arguments and judgments will be found reported in 2 P. D. 81. On appeal this judgment was reversed.

The arguments and judgment in the Court of Appeal will be found in 3 P. D. 1. The case was accordingly remitted to this Division in order that the questions of fact raised by the Queen's Proctor's pleas should be determined. The Queen's Proctor by these pleas alleged, First. Collusion; Secondly. That the petitioner and respondent were lawfully married; Thirdly. That the marriage was not procured by fraud; Fourthly. That the petitioner intended to, and did contract, a lawful marriage, and was not ignorant of the effect thereof; Fifthly. That the petitioner and respondent cohabited as man and wife; Sixthly. That the petitioner and respondent at the time of their marriage were

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domiciled in England. It was objected on behalf of the petitioner that the Queen's Proctor was not entitled to intervene on any ground but that of collusion.

This depends on the construction to be put on the 7th section of 23 & 24 Vict. c. 144.

By that section it is enacted that, during the period between the decree nisi and the decree absolute, "any person shall be at liberty to shew cause why the decree nisi should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court."

This part of the section does not apply because no decree nisi has been pronounced, but the section proceeds, "and at any time during the progress of the cause, or before the decree nisi is made absolute, any person may give information to the Queen's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary, and if from any such information, or otherwise, the Queen's Proctor shall suspect that any parties to the suit are, or have been, acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel, and subpœna witnesses to prove it."

In this case information was given to the Queen's Proctor of matter material to the due decision of the case, amongst other things, that facts tending to shew that the parties at the time of the marriage were not domiciled in Portugal, but in England, which were not brought before the Court, could be proved; and he therefore took the directions of the Attorney General on the subject, and, suspecting that the parties were acting in collusion, he, under the direction of the Attorney General and by the leave of the Court, intervened in the suit. Having so done, the question is whether he may plead anything besides collusion?

This question was decided in the affirmative in the case of *Dering* v. *Dering*. (1) There the intervention was after decree nisi. But in the case of *Drummond* v. *Drummond* (2) the same

(1) Law Rep. 1 P. & D. 531. (2) 2 Sw. & Tr. 269.

question had arisen before the decree nisi, and Sir C. Cresswell held that the Queen's Proctor was entitled to plead other pleas besides collusion; and the same course was allowed in *Boardman* v. *Boardman*. (1)

I therefore hold that the Queen's Proctor is entitled to set up other defences in addition to that of collusion, and I proceed to give my findings on the several issues raised by the Queen's Proctor's pleadings.

The first of these is whether the petitioner and respondent are guilty of collusion?

I am of opinion that this charge is not established.

The second is whether the parties were lawfully married?

It was not disputed that a ceremony of marriage was gone through which was valid according to the law of England. Whether it was valid according to the law of Portugal, and the effect of its invalidity by that law, will be considered hereafter.

The third issue is whether the marriage was procured by fraud?

I am of opinion that the evidence which was given before Sir R. Phillimore, as well as that which has been adduced before me, clearly establishes that the marriage was not procured by fraud.

Fourthly, whether the petitioner intended to contract a lawful marriage, or was ignorant of the effect thereof?

The evidence leaves no doubt on my mind that the petitioner intended to contract a lawful marriage, and was not ignorant of any fact the knowledge of which could be material to the constitution of a valid marriage.

On this point I may refer to the evidence of Mr. Miller, a solicitor who was consulted by the father of the respondent with regard to the marriage before its celebration, and he says that, being struck with the youth of the parties, he saw them on the subject both separately and together, and that he ascertained that they both wished it.

That they were ignorant of the effect of the Portuguese law on the ceremony is most probable, but this ignorance cannot affect the validity of the marriage.

(1) Law Rep. 1 P. & D. 233.

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The fifth issue is whether or not the petitioner and respondent cohabited as husband and wife?

I do not give any opinion on this question, as I consider it immaterial for the purpose of this cause: *Simonin* v. *Mallac.* (1)

The sixth issue is the important one on which the arguments have chiefly turned, namely, whether or not the petitioner and the respondent were, or either of them was, at the time of the marriage domiciled in England?

With regard to the petitioner, as she was a minor at the time of the marriage, her domicile was that of her father. His domicile was Portuguese down to the time of his coming to England in 1858, and I am not satisfied that he had at that time or at any time afterwards mental capacity to change his domicile. I therefore find that the domicile of the petitioner at the time of the marriage was Portuguese.

With regard to the respondent, he was also a minor, and his domicile was therefore the same as his father's, whom I shall call Gonçalo de Barros, though he was sometimes called Caldas. This person formerly carried on the business of wine grower and exporter in Portugal. In 1858 he came to England, bringing with him the whole of his family. Here he set up in business as a wine merchant and importer. In 1860 he took a lease of a house in Dorset Square for twenty-one years.

On the 31st of July, 1861, an agreement was entered into for the formation of a partnership for twenty years between the brother of Gonçalo de Barros and his sister and sister-in-law, as wine importers and merchants, under the style of Caldas Brothers, of which partnership Gonçalo was to be manager at a salary of 500*l.* per annum, with the option of becoming a partner. The business was to be and was carried on at 9, Catherine Court, St. Swithin's Lane. The firm of Caldas Brothers failed in 1865, but Gonçalo de Barros continued to reside in London, and his son the respondent, being still a minor, set up in the wine business. It is said by one of the witnesses that Gonçalo de Barros lived "privately" in London at the time, by which it would seem to be meant that he followed no business, but it is probable that the business of the son was regarded as the business of both. In

(1) 2 Sw. & Tr. 67.

1868, in the course of some legal proceedings which were instituted in Portugal, Gonçalo de Barros informed his solicitor that his domicile was English, and instructed him to collect evidence in support of this assertion, which was done.

In 1870, Gonçalo de Barros died in London, never having quitted England since his coming here in 1858. Evidence was given that he frequently said during this period that he meant to remain in England; and, on the other hand, the only evidence besides that of the petitioner and her mother offered to rebut the inference to be drawn from the facts above stated was that of one witness, that Gonçalo frequently said that he should return to Portugal "as soon as his affairs were settled." It is evident, however, that this is not the language of a man who has become the manager of a business at a salary of 500*l.* a year; and, even assuming the correctness of the witness' memory, such declarations cannot outweigh the evidence of the facts I have stated: *Doucet* v. *Geoghegan.* (1) From these facts I draw the inference that the father of the respondent, at the time he became the manager of the wine business, had adopted England as his place of permanent residence, with the intention of remaining there for an unlimited time; in other words, that he became domiciled here.

It follows, therefore, that the respondent's domicile was English. There is abundant evidence that the respondent himself, after he came of age, continued to look upon England as the place of his domicile, and this may, perhaps, have some reflex effect in considering which place his father had chosen as his domicile; but as the time of the marriage is the important point in the case, I do not think it necessary to dwell on the evidence of the respondent's subsequent intentions.

The question then arises, What is the law applicable to such a case? It is clear that the judgment which has been already given by the Court of Appeal is not applicable to such a state of facts. The language of the Court of Appeal is explicit. "It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicile

(1) 9 Ch. D. 441.

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of the latter. Our opinion in this appeal is confined to the case where both the contracting parties are at the time of their marriage domiciled in a country the laws of which prohibit their marriage."

This passage leaves me free to consider whether the marriage of a domiciled Englishman in England, with a woman subject by the law of her domicil to a personal incapacity not recognised by English law, must be declared invalid by the tribunals of this country. Before entering upon this inquiry, I must observe that the Lords Justices appear to have laid down as a principle of law a proposition which was much wider in its terms than was necessary for the determination of the case before them. It is thus expressed: "It is a well recognised principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicile;" and again, "As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile." It is of course competent for the Court of Appeal to lay down a principle which, if it formed the basis of a judgment of that Court, must, unless it should be disclaimed by the House of Lords, be binding in all future cases. But I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been "well recognised." On the contrary, it appears to me to be a novel principle, for which up to the present time there has been no English authority. What authority there is seems to me to be the other way.

Thus in the case of *Male* v. *Roberts* (1) the contract on which the defendant was sued was made in Scotland. The defence was that the plaintiff was an infant. But Lord Eldon held the defence bad, saying, "If the law of Scotland is that such a contract as the present could not be enforced against an infant, that should have been given as evidence. The law of the country where the contract arose must govern the contract."

Sir E. Simpson, in the case of *Scrimshire* v. *Scrimshire* (2), when dealing with this subject, says, "This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they are made, is conformable to what is laid down in our books, and what is practised in all civilized countries." And again (p. 413), "These authorities fully shew

(1) 3 Esp. 163. (2) 2 Cons. 412.

that all contracts are to be considered according to the laws of the country where they are made. And the practice of civilized countries has been conformable to this doctrine, and by the common consent of nations has been so received."

This is the view of the subject which is expressed by Burge, vol. i. c. 4, p. 132, and by Story, Conflict of Laws, s. 103; and Sir C. Cresswell, in *Simonin* v. *Mallac*, says (1): "In general the personal competency of individuals to contract has been held to depend on the law of the place where the contract was made." If the English reports do not furnish more authority on the point, it may perhaps be referred to its not having been questioned.

I cannot but think, therefore, that the learned lords justices would not desire to base their judgment on so wide a proposition as that which they have laid down with reference to the personal capacity to enter into all contracts. In truth, very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is indeed based upon the contract of the parties, but it is a status arising out of a contract to which each country is entitled to attach its own conditions, both as to its creation and duration. In some countries no other condition is imposed than that the parties, being of a certain age and not related within certain specified degrees, shall have contracted with each other to become man and wife; but that in these countries marriage is regarded not merely as a contract is clear, since the parties are not at liberty to rescind it. In some countries certain civil formalities are prescribed: in others a religious sanction is required. If the subject be regarded from this point of view, the effect of the recent decision of the Court of Appeal has only been to define a further condition imposed by English Law, namely, that the parties do not both belong by domicil to a country the laws of which prohibit their marriage. But, as I have already pointed out, that judgment expressly leaves altogether untouched the case of the marriage of a British subject in England, where the marriage is lawful, with a person domiciled in a country where the marriage is prohibited. With regard to such a marriage, all the arguments which have hitherto been urged in support of the larger proposition, that a marriage good by the law

(1) 2 Sw. & Tr. 77.

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of the country where solemnised must be deemed by the tribunals of that country to be valid, irrespective of the law of the domicile of the parties, remain with undiminished effect. They cannot, I think, be stated with greater accuracy and force than by Sir Cresswell Cresswell in *Simonin* v. *Mallac* (1), and as I certainly could not express myself so well, I shall adopt the language of that learned judge as my own, without introducing the qualification which the decision of the Court of Appeal has created. But before quoting the language of that very eminent judge, I must observe that the Court of Appeal has distinguished the present case from that of *Simonin* v. *Mallac* (1), on the ground that there the incapacity arose from the want of consent of parents, and that the "consent of parents required by the law of France must be considered a part of the ceremony of marriage." Certainly Sir C. Cresswell did not base his judgment on that ground. After observing that a distinction might be drawn between an absolute and a conditional prohibition, he proceeds: "But taking the decree of the French Court in the suit there instituted as evidence that by the law of France this marriage was void, we again come to the broad question, is it to be judged of here by the law of England or the law of France? In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such a rule does not extend to contracts of marriage, and that parties are with reference to them bound by the law of their domicile." Then, after reviewing the authorities, he says: "It is very remarkable that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnised in conformity with the laws of that country, should hold it void because the parties to the contract were the domiciled subjects of another country where such a contract would not be allowed." And later on the following passage occurs, which is especially applicable to the present case: "Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage

(1) 2 Sw. & Tr. 67.

contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame. But what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any such right, it must be found in the law of nations—that law to which all nations have consented, or to which they must be presumed to consent for the common benefit and advantage, and which would be for the common benefit and advantage in such a case as the present? The observances of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know or to take the responsibility of not knowing the law of that country. Now the law of France [in this case read Portugal] is equally stringent whether both parties are French or one only. Assume then that a French subject comes to England and there marries without consent a subject of any foreign country, by the laws of which such a marriage would be valid; which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed; would it not then be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know and to agree to be bound by? Again, assume that one of the parties is English, would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law?" "The great importance of having some one certain rule applicable to all cases, the difficulty, not to say impossibility of having any rule applicable to all cases, save that the law of the country where a marriage is solemnised shall, in that country at least, decide whether it is valid or invalid, the absence of any judicial decision or dictum, or of even any opposite opinion of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case, on any other rule than the law of England as prevailing amongst English subjects."

This was the opinion of Sir C. Cresswell, Channell, B., and

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Keating, J., constituting the full Court, whose decisions at that time were only subject to review by the House of Lords. The Court of Appeal has indeed, without alluding to the arguments of these very eminent judges, now overruled their opinion to some extent. But Cotton, L.J., has expressed his concurrence in their views, so far as is necessary for the purposes of the present case. He says, "No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country."

Numerous examples may be suggested of the injustice which might be caused to our own subjects if a marriage were declared invalid, on the ground that it was forbidden by the law of the domicile of one of the parties. It is still the law in some of the United States that a marriage between a white person and a "person of colour" is void. In some States the amount of colour which will incapacitate is undetermined; in North Carolina all are prohibited who are descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person (Pearson on Marriage, sect. 308). Suppose a woman domiciled in North Carolina, with such an amount of colour in her blood as would arise from her great grandmother being a negress, should marry in this country, should we be bound to hold that such a marriage was void? Or suppose a priest or monk domiciled in a country where the marriage of such a person is prohibited were to come to this country and marry an English woman, could the Court be called on at the instance of the husband to declare that the marriage was null and to give a legal sanction to his repudiation of his wife? Mr. Dicey, in his excellent treatise on Domicile, p. 223, answers these questions in the negative, and places these two cases under this head: "A marriage celebrated in England is not invalid on account of any incapacity of either of the parties, which though enforced by the law of his or her domicile is of a kind to which our Courts refuse recognition."

But on what principle are our Courts to refuse recognition if not on the basis of our laws? If this guide alone be not taken, it will be free to every judge to indulge his own feelings as to what prohibitions by foreign countries on the capacity to contract a marriage are reasonable. What have we to do, or, to be more accurate, what have English tribunals to do with what may be thought in other countries on such a subject? Reasons may exist elsewhere why coloured people and whites should not intermarry, or why first cousins should not. But what distinction can we properly draw between these cases, and why are they not both to be regarded in the same light here, namely, that as they are alike permitted by our laws we cannot recognise their prohibition by the laws of other countries as a reason why we should hold that such marriages cannot be contracted here.

Of the cases cited on the argument the only one which I think necessary to mention is that of *Mette* v. *Mette* (1), where Sir C. Cresswell held that a domiciled English subject could not marry his deceased wife's sister at the place of her domicile, although by the law of that place the marriage would be good. But Sir C. Cresswell had himself pointed out in *Simonin* v. *Mallac* (2) the difference between controversies arising in the country where the marriage was celebrated and those arising elsewhere; and his judgment in that case shewed that he considered that the law of the place of celebration must prevail before the tribunals of that place.

Before concluding, I wish to direct attention to the statute law on the subject of the marriage of first cousins. The statute of 32 Hen. 8, c. 38, after reciting that the See of Rome had usurped the power of making that unlawful which by God's law was lawful, and the dispensation whereof they always reserved to themselves as in kindred or affinity between cousins german, and all because they would get money by it and keep a reputation for their usurped jurisdiction, enacts that "all and every such marriages as within this Church of England shall be contracted between lawful persons as by this Act we declare all persons to be lawful that be not prohibited by God's law to marry" shall be valid.

(1) 1 Sw. & Tr. 416. (2) 2 Sw. & Tr. 67.

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This statute and all the marriage Acts which have since been enacted are general in their terms, and therefore applicable to, and bind, all persons within the kingdom. In the weighty language of Lord Mansfield, "the law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there:" *Campbell* v. *Hall.* (1)

Where is the enactment, or what is the principle of English law, which engrafts on this statute the exception that it shall not apply to the marriage in England of cousins german, who by the law of another country were prohibited from marrying without the dispensation of the pope? And, further, I would ask what is the distinction between the prohibition of a marriage, unless the consent of a parent be obtained as in *Simonin* v. *Mallac* (2), and the prohibition of a marriage unless the dispensation of the pope be granted, as in this case? And if there be a distinction, which I am unable to perceive, why is greater value to be attached by the tribunals of this country to the permission of the pope than to that of a father?

For the reasons I have given, I hold that the marriage between the petitioner and the respondent was valid, and I dismiss the petition.

Solicitors for Petitioner: *Tamplin & Co.*
The Queen's Proctor.

Nov. 6; *Dec.* 2.

JENNER *v.* FFINCH AND OTHERS.

Will—Revocation by Implication—Parol Evidence of Intention—Execution—Presence of Testatrix—Costs.

If upon the face of a testamentary document and the facts known to the testatrix at the time of its execution, it is doubtful whether the testatrix intended altogether to revoke a former will, the Court will admit parol evidence to ascertain the intention.

In such a case the doubts having been caused by the condition in which the testatrix had left her testamentary papers, the Court allowed the costs of all

(1) Cowp. 208. (2) 2 Sw. & Tr. 67.

parties out of the estate, including, besides the costs of the executors propounding the former will, the costs of legatees named in it.

A testatrix signed a document in the presence of two witnesses, who twenty minutes afterwards subscribed the document in an adjoining room. The door was open, but the testatrix was not aware that they were signing:—

Held, that the document was not duly executed.

THE plaintiff Constance Elizabeth Jenner propounded a will dated the 2nd of February, 1879, of Emma Selina Loring, late of No. 2, Sydney Place, Bath, spinster, who died on the same day. The defendants, Messrs. Ffinch, Stamp, and Jameson, after pleading (amongst other things) that the paper writing propounded by the plaintiff is not testamentary, also propounded a will dated the 10th of July, 1876, of which the testatrix had appointed them executors. The Rev. Edward H. Loring and others, parties cited, pleaded that previous to the execution of the will of the 2nd of February, 1879, and on the same day the testatrix executed another document containing the words, "I wish the will I made destroyed," and that this and the other document of the same date together constituted the last will.

The wills of the 10th of July, 1876, and of the 2nd of February, 1879 (which are more fully referred to in the judgment), were in many respects inconsistent with each other, and together disposed of much more property than the testatrix possessed.

The following are the bequests in the will of the 10th of July, 1876:—

All watches, &c., ornaments of the person, books, manuscripts, carriages, &c., and stable furniture	To cousin Constance E. Jenner.
Plate, &c. . . .	Hector MacNeal.
£5000	Edw. Henry Loring.
£1000	Hector MacNeal.
£1000	Walter Loring MacNeal.
£500	Lisette Caroline Drury.
£500	Alice Mary Master.
£100	Wm. Norman Winckworth.
£200	Amabel E. Skipper.
£200	Ethel Rosine Jukes Keele.

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£500	L. A. H. Butcher.
£25	Fanny Reekes.
£25	E. Hunt.
£500	J. F. Halstead.
£1000	North Devon Infirmary.
£1500	To augment the stipend of the Vicar of Holy Trinity, Barnstaple.
All my share and interest in which my grandmother, Mrs. Jameson, has a life interest	To my cousin Constance Eliz. Jenner.
Residue . . .	Hector MacNeal.

The following are the bequests in the will of the 2nd of February, 1879 :—

All watches, &c., ornaments of the person, books, manuscripts, carriages, &c., and stable furniture	Constance E. Jenner.
All Loring plate . .	Hector MacNeal.
£10,000	Edwd. Hy. Loring.
£1000	Arthur H. Loring.
£1000	Walter Loring MacNeal.
£500	Lisette Caroline Drury.
£500	Alice Mary Master.
£100	Wm. Norman Winckworth.
£200	Amabel E. Skipper.
£200	Ethel Rosine Jukes Keele.
£100 for life . . .	Fanny Reekes.
£400	J. F. Halstead.
All mother's money .	Cousin Constance Eliz. Jenner.

The testatrix died possessed of property amounting in value to about 18,000*l.*, and it will be seen that by the first will the legacies in money amounted to about 12,000*l.*, and by the second will to about 14,000*l.* The document containing the words, "I wish the will I made destroyed," was not attested until shortly after it was signed by the testatrix, and when the witnesses did sign, they did not sign in the actual presence of the testatrix.

Dr. Deane, Q.C., and *Middleton*, for the plaintiff. The last will is inconsistent with the first. It exhausts all the property, and alters all the legacies in the first will. The first will is therefore revoked by implication: *Dempsey* v. *Lawson*. (1)

Inderwick, Q.C., and *Searle*, for the defendants. A will duly executed can only be revoked by another will shewing within itself an intention to revoke the former. The Court cannot look beyond the documents themselves. These two wills are not upon the face of them inconsistent with each other, and must therefore be admitted to probate.

Phillimore, for Loring. The document with the words, "I wish the will I made destroyed," was duly executed. The Court will infer from all the circumstances that the document was executed in the presence of the testatrix: *Birks* v. *Birks* (2); Williams on Executors, 8th ed., p. 170.

Lawrence, Q.C., and *Meyrick*, appeared for Messrs. McNeal; and *J. F. Skipper*, for other legatees.

Cur. adv. vult.

1879. Dec. 2. THE PRESIDENT. Emma Selina Loring, the deceased in this case, died on the 2nd of February, 1879. She had made a will on the 10th of July, 1876, by which she left her watches, jewels, trinkets, ornaments, wearing apparel, books, manuscripts, carriages, harness, and stable furniture to her cousin Constance Elizabeth Jenner; and her plate and plated articles to her cousin Hector MacNeal; and the following legacies: to her cousin E. H. Loring 5000*l.*, to Hector MacNeal 1000*l.*, to her cousin Walter MacNeal 1000*l.* Then followed a number of pecuniary legacies to friends, servants, and charities, and she bequeathed "all the share and interest which shall belong to me at my death in which my grandmother Mrs. Jameson now has a life interest to my cousin Constance Eliz. Jenner, and she bequeathed the residue of her personal estate to the said Hector MacNeal for his own use and benefit," and she appointed the defendants executors.

In the same house in which the testatrix was lying "sick unto death," her grandmother Mrs. Jameson was also residing, but

(1) 2 P. D. 98. (2) 4 S. & T. 23.

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unable from infirmity to communicate with the testatrix otherwise than by writing. On the 1st of February she wrote a letter to the testatrix, reminding her of the necessity of making her will, and advising certain dispositions "as the MacNeals are so well off." Shortly after this the testatrix dictated to her cousin Constance, the plaintiff, who was assisting in nursing her, the following words: "I wish the will I made destroyed." This having been reduced to writing was signed by the testatrix in the presence of the plaintiff and Charlotte May, the nurse, but they did not attest it at the time. An interval of twenty minutes or half an hour elapsed before the witnesses put their names to the paper, and they did so in the adjoining dressing-room, though with the door open, yet out of sight of the testatrix and without her being conscious that they were engaged in any act connected with the paper she had herself signed. In no sense can it be said that the witnesses signed in the presence of the testatrix, and this document is therefore inoperative as a testamentary instrument.

After signing the paper expressing her wish that her will should be destroyed the testatrix again dictated to her cousin, who at her dictation wrote as follows:—[The judge here read the document of the 2nd of February, 1879.] It will be seen on examination that the legacies made in this paper are some of them to the same persons and for the same amount as in the former will; some for larger amounts and others for smaller, while a few are omitted. This paper was duly executed by the testatrix in the presence of two witnesses who duly attested it. It is clear that this document must be admitted to proof as testamentary, but the question remains whether it is to be admitted to proof alone or together with the will of July, 1876.

It was submitted by counsel for the plaintiff that the case was governed by that of *Dempsey* v. *Lawson* (1), and that it followed from that decision that the paper of the 2nd of February, 1879, should alone be admitted to proof.

I do not, however, think that *Dempsey* v. *Lawson* (1) is an authority upon the point which is raised for consideration on this occasion. In *Dempsey* v. *Lawson* (1) I relied solely on the contents of the second instrument, taken in connection with the

(1) 2 P. D. 98.

earlier one, and with the facts with reference to which the second was made, and which might therefore afford a guide to the testatrix's meaning.

In the present case, although I think that the will of the 2nd of February, 1879, does contain some internal evidence of the intentions of the testatrix that it should be in substitution of the first, I think it desirable, if I can properly do so, to have recourse to external evidence to shew whether or not the testatrix intended the last instrument to constitute her sole will, and so by implication to revoke the first. This makes it necessary that I should consider the question which I advisedly left undetermined in *Dempsey* v. *Lawson* (1), whether such external evidence is admissible, and under what circumstances.

By the Wills Act (1 Vict. c. 26, s. 20), it is enacted that "No will or codicil or any part thereof shall be revoked otherwise than aforesaid (i.e., by marriage) or by another will or codicil executed in manner hereinbefore required." This leaves untouched the question what will being duly executed will revoke an earlier one. I think it clear that no express words of revocation are necessary. The authorities appear now to establish that revocation by implication is sufficient. On this point I refer to what I said in *Dempsey* v. *Lawson*. (1) The question what instruments are to be admitted to probate, as together or separately constituting the testator's last will, is solely for the Court of Probate as it was formerly for the Ecclesiastical Court.

In considering this question the Prerogative Court did in some circumstances admit parol evidence with respect to the factum of the instrument, in order to investigate quo animo the act was done by the testator.

The subject was very fully considered by Sir H. Jenner in *Thorne* v. *Rooke* (2), and he came to the conclusion that where there is something on the face of the instrument raising doubt or ambiguity as to whether it was intended by the testator to be in substitution for or addition to a previous will, the Court is justified in having recourse to external evidence to ascertain the testator's intentions. In the case before him the learned judge thought there was no such doubt or ambiguity, but the cases of

(1) 2 P. D. 98. (2) 2 Curt. 799.

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Methuen v. *Methuen* (1), commented on and not disapproved of by Sir H. Jenner, may be referred to as shewing what doubt arising on the face of the instrument, and taken in connection with the facts known to the testator, will be sufficient to justify the admission of external evidence.

There the testator having made one codicil, under which his wife and daughters took certain benefits, after the marriage of one of the daughters made a codicil in which, after reciting that he had made a provision for this daughter, proceeded to make dispositions in favour of the wife and daughters differing from those in the first codicil. There was nothing making it absolutely impossible that the testator meant their disposition to be cumulative, but, as Sir H. Jenner points out, it did appear that if both the codicils had been acted upon "the property of the deceased would not have been equal to the payment of all the legacies that had been given."

It was upon this state of facts that Sir J. Nicholl said:—"The first instrument remains uncancelled and there are no revocatory words in the second. It is contended that the Court has no power to inquire further, but the same rules do not apply in a case relating to the factum of the will which would apply if the inquiry were concerning the construction of it. In the Court of Probate the whole question is one of intention. The animus testandi and the animus revocandi are completely open to investigation in this Court. It is admitted that if there is doubt on the face of the instrument the Court may admit parol evidence."

The same learned judge's remarks to the same effect in *Greenough* v. *Martin* (2) may also be referred to.

Accepting then as correct Sir H. Jenner's limitation of the power of this Court to admit parol evidence to those cases in which the instrument itself (in connection with the facts known to the testator) gives rise to doubt, I proceed to consider in what respect the instrument of the 2nd of February, 1879, taken in connection with the state of the testator's family and the nature and extent of her property, gives rise to doubt whether she intended it to be an addition to her previous will.

In the first place there is that element of doubt which was

(1) 2 Phill. 416. (2) 2 Add. 239, 243.

present in the case of *Methuen* v. *Methuen* (1), which was pointed out by Sir H. Jenner as justifying parol evidence, namely, that the property of the testatrix would be wholly insufficient to meet the legacies if those given by the last instrument are to be considered cumulative to those given by the first. Can anything be more improbable than that the deceased lady intended to dispose of property substantially twice as much as she possessed? It is not impossible in some circumstances that a testator might contemplate dying worth more than he possessed at the time of making his will, but there is nothing in this case to suggest the probability of this testatrix contemplating such a contingency.

There is also the further fact that some of the dispositions of the instrument of the 2nd of February must have been intended as in substitution for and not in addition to the dispositions of the first. I refer especially to the bequest to the present plaintiff in these words, "all my mother's money to my cousin, Constance Elizabeth Jenner." It was not disputed that this includes the same property as the testatrix had by her first will given to the plaintiff under the description of the share and interest, &c., "in which her grandmother had a life interest."

These and some minor matters such as the repeated gift appearing on the face of the instrument of the carriages, books, &c., to the plaintiff, and the gift of "all the Loring plate" to Captain MacNeal, appear to me to give rise to that amount of doubt which justifies the Court in having recourse to external evidence, in order to ascertain whether the testator intended this instrument to be an addition to her will or in substitution for it in whole or in part.

But when external evidence is admitted in this case, it becomes clear beyond the possibility of doubt that the testatrix did not intend this document to be an addition to the will, but did intend it to be in substitution for it, for she was under the impression that she had effectually put an end to her will by directing it to be destroyed. The changes in the disposition of the first will effected by the second to the disadvantage of the MacNeal family were no doubt made in consequence of her grandmother's letter. It is clear therefore, when the external facts are looked at, that

(1) 2 Phill. 416.

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she intended the paper of the 2nd of February to be her sole will, and by it, and by no other instrument, intended to dispose of her property. I therefore hold that by implication it revoked the will of 1876, and that it alone should be admitted to probate.

The litigation having arisen from the state in which the deceased left her testamentary papers, and the interests of the parties represented at the hearing being different, the costs of all parties must be borne by the estate.

Solicitors for plaintiff: *Collyer-Bristow & Co.*

Solicitors for defendants: *Clarke, Woodcock, & Ryland.*

Solicitors for interveners: *Bowlings, Foyer, & Horderer; J. B. C. Huxham; Pike & Son; Barnard & Co.*

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Jan. 13.

THE SOLICITOR OF THE DUCHY OF CORNWALL AGAINST THE NEXT OF KIN, &c., OF THOMAS CANNING.

Administration—Bastard Intestate—Rights of the Duchy of Cornwall—Bond—Sureties.

T. C. died in Cornwall, intestate, without known relations. The Court granted letters of administration of his estate for the use of His Royal Highness the Prince of Wales as Duke of Cornwall; but, *semble*, without prejudice, to the rights of the Crown.

The Court also dispensed with sureties to the administration bond.

THOMAS CANNING, late of Penryn, in the county of Cornwall, died on the 17th of January, 1877, at Penryn, intestate, without any known relation, leaving his widow, who died without having taken out letters of administration to his estate.

His Royal Highness the Prince of Wales, in right of his Duchy of Cornwall, claimed to be entitled to one moiety of the deceased's estate, the other moiety belonging to the representative of the deceased's widow.

The usual citation was accordingly issued and advertised, and no appearance had been entered on behalf of any person, and the Queen's Proctor, on being applied to, did not oppose the prince's claim, but stated that his waiver was, "without prejudice, to the rights of the Crown."

The Attorney General to H.R.H. the Prince of Wales (*C. Hall*)

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SOLICITOR OF DUCHY OF CORNWALL v. CANNING.

moved the Court for a grant of letters of administration of the deceased's personal estate to the solicitor of the duchy for the use of His Royal Highness. This is the first application of the kind, but the Prince is on the same footing in respect of his duchy as the Crown is in respect of the rest of the kingdom. The charters of the duchy have always been treated both by the Courts of Judicature and the legislature as having vested in the Dukes of Cornwall the whole interest and dominion of the Crown in and over the whole county of Cornwall: *The Prince's Case* (1); *Rowe* v. *Brenton* (2); *Attorney General of the Prince of Wales* v. *St. Aubyn* (3); *Attorney General of the Prince of Wales* v. *Crossman* (4). Moreover, the Crown has in various instances recognised the prince's rights in cases similar to the present. He also asked, under the 81st section of the Probate Act (20 & 21 Vict. c. 77), that the usual sureties might be dispensed with.

THE PRESIDENT. If the application rested on the letter of the solicitor of the Treasury, I do not think I should be in a position to grant the application, inasmuch as the letter contains the clause "without prejudice to the rights of the Crown." Primâ facie the rights of the Crown are paramount in cases of this kind, and it is therefore the duty of the Court to consider whether the evidence in support of the prince's claim is sufficient. The hypothesis is that there were no relations and no creditors. The solicitor of the Treasury offers no opposition to the grant, while reserving the rights of the Crown, whatever they may be, and the solicitor for the Prince of Wales shewed, by his affidavit, that the Treasury had on previous occasions recognised his right to deal with the estates of deceased persons under the circumstances of the present case. The evidence, therefore, in the absence of objection, appears to me to be sufficient to establish the prince's claim, and I grant the application.

The grant was made to the solicitor for the duchy. The Court required that the usual bond should be given, but dispensed with sureties.

Solicitor: *T. B. Heathcote*, Solicitor to the Duchy of Cornwall.

(1) 8 Rep. 1, 27.
(2) Con. 33, 149, 154.
(3) Wigh. 167, *et seq.*
(4) Law Rep. 1 Ex. 381; 21 & 22 Vict. c. 109.

1880
Feb. 10.

IN THE GOODS OF BLEWITT, Deceased.

Will—Interlineations—Attestation by Initials.

The initials of a testatrix and the attesting witnesses in the margin of the will opposite interlineations are sufficient to render the interlineations valid.

Sarah Blewitt, late of No. 43, Chelsham Road, Clapham, in the county of Surrey, widow, died on the 27th of December, 1879. On the day before her death she executed her will, and after it had been duly attested two interlineations were made, the one giving an additional legacy and the other appointing another executor. The testatrix then, in the presence of the witnesses who had attested the will, signed her initials in the margin of the will opposite the interlineations, and the witnesses added their initials.

Bayford, for the executors, asked for the direction of the Court as to the interlineations.

S. Stephens, for the legatee, asked for probate with the interlineations. The statute has been sufficiently complied with: *In the Goods of Wingrove* (1); *In the Goods of Hinds* (2); *In the Goods of Amiss* (3); *In the Goods of Christian.* (4)

Cur. adv. vult.

Feb. 10. The President. Two interlineations were introduced into the will after execution and attestation, but the testatrix signed with her initials in the margin against these interlineations, and the witnesses subscribed their initials in attestation of this signature of the testatrix. The Wills Act, s. 21, enacts that "no . . . . interlineation or other alteration made in any will after the execution thereof shall be valid . . . . unless such alteration shall be executed in like manner as is required for the execution of the will, but the will with such alteration as part thereof shall be deemed to be duly executed if the signature of

(1) 15 Jur. 91.
(2) 16 Jur. 1161.
(3) 2 Rob. 117.
(4) 2 Rob. 111.

the testator and the subscription of the witnesses be made in the margin," &c.

The only question, then, is, whether the signature and subscription by initials only are sufficient.

A mark is sufficient though the testator can write: *Baker* v. *Dening.* (1)

Initials, if intended to represent the name, must be equally good. The language of the Lord Chancellor in *Hindmarsh* v. *Charlton* (2), seems equally applicable to the testator's signature as to the witnesses' subscription: "I will lay down this as to my notion of the law that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name;" and Lord Chelmsford says, "The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the name in full."

In *Christian's Case* (3) the initials of the witnesses were held sufficient, although if merely placed to attest the alteration they will not serve as an attestation to the will itself: *Re Martin, deceased.* (4)

I am therefore of opinion that the interlineations against which the initials of the testatrix and the witnesses are placed, should be admitted to proof.

Solicitor for executors: *G. S. Warmington.*
Solicitor for legatee: *R. Hewlett.*

(1) 8 Ad. & E. 94.
(2) 8 H. L. C. 160, at p. 167.
(3) 2 Rob. 110; S. C. 7 N. C. 265.
(4) 1 Rob. 712; S. C. 6 N. C. 694.

1879
July 1.

THE NEERA (1879 O. 63. 1879 O. 64).

Taxation of Costs—Discretion of Registrar—Counsel's Fees—Retainers—Refreshers.

The Court will not ordinarily interfere with the taxation of costs by the registrar, unless the decision of the registrar is shewn to have been erroneous in principle.

According to the ordinary practice of the Court retainer fees for both the leading and junior counsel are allowed on taxation.

The taxing officer having disallowed refresher fees to counsel, in a case where the hearing commenced on the afternoon of one day, and was concluded at noon of the next, but the time occupied was less than one day's time, the Court refused to interfere with his discretion.

THESE were consolidated actions of salvage instituted, one (1879 O. 63) on behalf of the owners, master, and crew of the steam tug *Toiler*, and the other (1879 O. 64) on behalf of the owners, master, and crew of the steam tug *Lord Lyons*, against the screw steamship *Neera*, her cargo and freight.

On the 27th of January, 1879, the above-mentioned actions were by an order of the Liverpool district registrar consolidated with a consolidated action of salvage carried on on behalf of the owners, master, and crew of the *Toiler* and of the owners, master, and crew of the *Lord Lyons* against the steam hopper *No.* 4; and on the 4th of April the actions so consolidated came on for hearing together, immediately after the hearing of an action of damage instituted on behalf of the owners of the *Neera* against the steam hopper *No.* 4 for the recovery of damages arising out of a collision which occurred previously to the rendering of the services in respect of which the salvage actions had been brought. The hearing was continued and concluded on the 5th of April, when the Court awarded salvage remuneration to the plaintiffs in the above-mentioned salvage actions against the *Neera*, her cargo, and freight, and condemned the defendants, the owners of the *Neera*, her cargo, and freight in the costs of the same actions. Subsequently Messrs. Stone & Fletcher, who had acted as solicitors both for the owners of the *Toiler* and the owners of the *Lord Lyons* in the consolidated actions of salvage against the *Neera*, brought in the bill of costs of the plaintiffs, the owners, master, and crew of the *Toiler* to be taxed as between party and party,

and amongst other items the Liverpool district registrar disallowed the amount of a retainer paid to the leading counsel retained on behalf of the owners, master, and crew of the *Toiler*, and the amount of the refresher fees to their counsel for the second day of the hearing of the actions against the *Neera*. On the 10th of June Messrs. Stone & Fletcher carried in objections to the disallowance of the above mentioned amongst other items, and applied to the district registrar to review his taxation with respect to the same. The following is a copy of the objections so far as they are material:—

3. The plaintiffs, the owners, master, and crew of the *Toiler* object to the retainer fee paid to their leading counsel being disallowed on the ground that it is usual and customary to allow retainer fees to leading counsel when it is sworn they have been paid; it is quite clear the retainer would be given before delivery of the brief although it is charged for afterwards in the bill of costs; and lastly;

4. They object to the refresher fees to their counsel being disallowed for the following reasons:—

Out of the collision between the steamship *Neera* and the mud hopper *No.* 4 there arose five actions, namely, the damage action which was fixed to be heard on the 3rd day of April last; the two actions brought by the *Toiler* and the *Lord Lyons* against the hopper, and which were subsequently consolidated by the order of the district registrar and the two actions of salvage against the *Neera* consolidated by a similar order, both of which were fixed to follow on for hearing after the damage action was heard, the 4th and 5th days of April last having been kept open for them. The solicitors for the plaintiffs, the owners of the *Toiler*, were appointed the solicitors in both consolidated actions, and accordingly briefed two counsel, the other plaintiffs having leave to appear by one counsel only at the trial. The present defendants were represented by two counsel, and the defendants in the action against the hopper by three.

After judgment had been given by his Lordship in the damage action, on the 4th the salvage cases were called on, and the judge, to facilitate matters, said he should follow the usual course of procedure in such cases, and accordingly ordered them all to be heard together.

Ten witnesses were called on the 4th, and the Court adjourned till next morning, Saturday, when then followed all the speeches and the judgment.

The Liverpool district registrar having reconsidered his taxation adhered to his decision, and on the 20th of June stated the grounds and reasons of his decision with reference to the disallowance of the retainer and refresher fees to counsel in the following terms:—

3. The plaintiffs have been allowed a retainer fee to one counsel, and it is not usual to allow more than one fee; moreover it does not appear that the retainer to leading counsel was given before the brief was delivered, and it was therefore really unnecessary.

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4. Both consolidated actions were by arrangement heard together. They were called on at about 1.15 o'clock on the 4th of April, and after ten witnesses had been examined they were adjourned to the following day, and were finished on the 5th of April about 12.30 o'clock, thus taking together less than a day.

If each action had been heard separately the question of refresher fees would not have arisen, as the hearing of neither of them would have extended from one day into another. As the cases did not occupy one full day's time, although the hearing took portions of two days, and acting upon the principle laid down in the judgment of the Master of the Rolls in the case of *Harrison* v. *Wearing* (1), the effect of which was that refresher fees should be allowed to counsel where a case takes more than one day's time, I am of opinion that in this case counsel were not entitled to refresher fees.

July 1. *E. C. Clarkson*, on behalf of the owners, master, and crew of the *Toiler*, moved the judge to review the taxation of costs in the above-mentioned consolidated actions of salvage against the *Neera* upon the objections filed against the same.

Squarey, for the defendants opposed the motion.

SIR ROBERT PHILLIMORE. I shall allow the retainer which has been disallowed in this case. It has always been the practice in the London registry of this court to allow retainers to leading counsel, and I see no reason why the practice should be departed from. I must, therefore, reverse the decision of the district registrar on this point.

I think the dictum of the Master of the Rolls, in the case of *Harrison* v. *Wearing* (1) that the taxing-masters at common law adopted a reasonable rule when they decided that, if a case took more than a day's time, refreshers should be allowed, is in favour of the decision the Liverpool district registrar has come to with respect to the refreshers in this case; and I do not think that I ought in the circumstances of the case to interfere with the discretion he has exercised in disallowing them. The taxation of the district registrar will stand except as regards the disallowance of the retainer. There ought not to be a different practice as to taxation of costs in the Liverpool district registry from that which prevails in the principal registry.

Solicitors for plaintiffs: *Stone & Fletcher.*

Solicitors for defendants: *Field & Weightman.*

(1) 11 Ch. D. 206.

THE DON RICARDO. (1880 Y. 20.)

1880
Feb. 4.

Wages—Practice—Foreign Plaintiff—Summons for Security for Costs—Caveat Release—Groundless objection to Bail—Costs and Damages.

Where a caveat release is entered and groundless objections are taken to the sufficiency of bail, the party entering the caveat will be condemned in damages and costs.

It is in the discretion of the Court to allow the mate of a foreign vessel, though not domiciled in England, to prosecute an action for wages without giving security for costs.

THIS was an action of wages instituted by a mate against a German barque. In the affidavit to lead the warrant the plaintiff was described as of No. 2, The Crescent, Minories, in the city of London. The defendants entered into the usual bail bond with sureties on the 22nd of January, 1880, and on the same day served notice of bail on the solicitor for the plaintiff. On the 23rd of January the solicitor for the plaintiff entered a caveat release, and informed the defendants by letter that the plaintiff was not satisfied with the bail.

On the 27th of January the defendants moved the judge in court to order the immediate release of the vessel notwithstanding the caveat, and to condemn the plaintiff in costs and damages arising from the detention of the vessel. The judge directed that the sureties should be produced before the registrar for cross-examination on their affidavits of justification, and that in the meantime the motion should stand adjourned.

On the 29th of January the solicitors for the defendants took out a summons calling upon the plaintiff to give security for the defendant's costs. In support of the summons an affidavit was filed in which it was stated—

That the plaintiff was a native of Germany, and had no fixed abode in this country, and no property, and had no means of satisfying the defendants' costs in the event of a verdict being given for the defendants.

On the 30th of January the registrar reported, inter alia, that the sureties were persons of considerable means and were sufficient sureties for a much larger sum than the amount in which they had

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given bail in the action, and that in his opinion the objections to their sufficiency had been vexatious and groundless. On the same day the solicitor for the plaintiff withdrew the caveat and the *Don Ricardo* was released.

Feb. 4. The summons calling upon the plaintiff to give security for the defendants' costs came on together with the adjourned motion for costs and damages.

E. C. Clarkson, for the defendants.

[SIR ROBERT PHILLIMORE referred to rule 54 of the Admiralty Court Rules of 1859, and the case of *The Corner*. (1)]

Verney, on behalf of the plaintiff, opposed the motion, on the ground that the plaintiff had not been guilty of gross negligence, and relied on affidavits which stated that the plaintiff believed from the reports he had received that the bail objected to were not in a position to satisfy the amount of the claim in the action, and that his solicitor immediately after the entry of the caveat had offered to withdraw it on the defendants' solicitors undertaking to furnish fresh bail in case the objection to the bail should prove to be well founded. [He referred to the cases of *The Evangelismos* (2) and *The Strathnaver*. (3)] The Court has a discretion as to whether it will order the plaintiff to give security for costs.

Clarkson, in reply.

SIR ROBERT PHILLIMORE. I am satisfied that I ought in the special circumstances of the case, and bearing in mind the decision of Dr. Lushington in the case of *The Corner* (1), to condemn the plaintiff in damages for the detention of the *Don Ricardo* and in the costs occasioned by the entry of the caveat and the objection to the bail. I direct the amount of the damages to be assessed by the registrar. With regard to the question as to whether the plaintiff should be made to give security for costs, I have been referred to the case of *The Franz et Elize* (4); but in that case the plaintiff had been master of the vessel proceeded against. And, on the whole, I think it would be hard in the circumstances

(1) Br. & L. 161.
(2) 12 Moo. P. C. 352.
(3) 1 App. Cas. 58.
(4) Lush, 377.

of this case to make the plaintiff, who was only in the position of a mate on board the *Don Ricardo*, give security for costs. I shall therefore in my discretion make no order on the summons for security for costs.

Solicitor for plaintiff: *Sewell.*

Solicitors for defendants: *Clarkson, Son, & Greenwell.*

THE ARIZONA. (1880. No. 125.)

April 13.

Appeal from Suspension of Certificate by Court of Inquiry into Shipping Casualty—Jurisdiction—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 242, 432—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 23—*Shipping Casualties Investigations Act*, 1879 (42 & 43 *Vict. c.* 72), *s.* 2—*Costs of Appeal.*

Where a court of inquiry into a shipping casualty, held under the eighth part of the Merchant Shipping Act, 1854, orders the suspension of a master's certificate, in pursuance of the powers given by the 242nd section of the same Act, and the 23rd section of the Merchant Shipping Act, 1862, the Court of Appeal, having jurisdiction under the Shipping Casualties Investigations Act, 1879, will on appeal consider the evidence on which the judgment of the court of inquiry proceeded, and will reverse the judgment if the evidence is insufficient to justify the suspension of the certificate.

Where a court of inquiry ordered a master's certificate to be suspended, and the only ground on which the decision could be supported was that serious damage to a ship had been caused by the wrongful act or default of the master, within the meaning of s. 242 of the Merchant Shipping Act, 1854, sub-s. 2, and on appeal it appeared to the Court of Appeal that there was no evidence that the damage had been caused by the wrongful act or default of the master, the Court of Appeal reversed the decision, and restored to the master his certificate.

The Court below having suspended the certificate on the invitation of the Board of Trade, the Court of Appeal ordered the Board of Trade to pay the costs of the appeal. (1)

THIS was an appeal under the 2nd section of the Shipping Casualties Investigation Act, 1879, on behalf of the master of the British steamship *Arizona*, from a report or decision of the stipendiary magistrate of Liverpool, suspending his certificate.

(1) It is now provided by Rule 6, sub-sect. 2, of The Shipping Casualties (Appeal and Rehearing Rules), 1880, which came into force on the 21st of April, 1880, that in appeals under 42 & 43 Vict. c. 72, s. 2: "The Court of Appeal shall have power to make such order as to the whole or any part of the costs of and occasioned by the appeal as may seem just."

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The decision appealed from was given at the conclusion of an investigation held, under the provisions of the Merchant Shipping Acts, into the circumstances attending material damage caused to the *Arizona*.

The following is the material part of the report appealed from:—

The Court having carefully inquired into the circumstances attending the shipping casualty, finds, for the reasons stated in the annex hereto, that the material damage was occasioned by collision with an iceberg, which was not seen in time to be avoided, and that the look out was inefficient, and the Court found the master, Mr. Thomas Jones, in default, and suspended his certificate for six calendar months.

The following is a copy of the material portions of the annex referred to in the above report:—

The *Arizona* left New York on the 4th of November, 1879, with a crew of 145 hands all told, about 250 passengers, and a full general cargo, under the command of Mr. Thomas Jones, who holds a certificate of competency as master, No. 12,356, dated the 31st of December, 1857, who had been nineteen years in the same employ, and who had commanded the *Arizona* for the last four voyages. Nothing of any consequence occurred till the 7th. On the morning of that day the whale back which covers over the fore part of the vessel was painted, and owing to this circumstance when the look-out were placed at 5.40 P.M. they were stationed on the skid bridge instead of on the fore part of the whale back. The skid bridge is situated about 125 feet abaft the stem head, and about 40 feet before the main bridge. On the centre of the skid bridge was a large skylight, and there was a boat stowed on each side, leaving a space on each side of six or seven feet for the look out. It was about 8 feet lower than the main bridge, and about the same level as the whale back. At 8 P.M. the second mate took charge, and two A.B.'s, Dallas and Jones, were stationed on the skid bridge on the look out, one on each side. The vessel's course at this time was E. by S., and she was going about 15½ knots. The weather was fine and calm, with a slight head swell, and tolerably clear, except that a heavy bank extended from E.N.E. to S.E. across her bows, which somewhat increased in density before the collision. The master was on the bridge at 8 P.M., but went below shortly afterwards, having seen the look-out men on the skid bridge, and apparently he approved of their being placed there. About 8.45 P.M. one of the look-out men saw something ahead which he took in the first instance to be a cloud. He did not report anything, but consulted the other man on the look out, and they had concluded that it was ice which they saw, when almost simultaneously with their arriving at this conclusion the second mate sung out "What's that ahead?" upon which they replied "An iceberg!" The second mate ordered the helm to be put hard-a-starboard, and telegraphed to the engine-room "Stop," and immediately after "Reverse full speed," all which orders were promptly obeyed. But in one minute the ship collided with the iceberg, which she struck on the N.E. corner, and which drove in her bows about 20 feet. The vessel was backed off and stopped,

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and a boat was put out to ascertain how far the vessel was damaged. When it was found that the ship made no water, the captain decided to bear up for St. John's, Newfoundland, which was about 241 miles distant, and they arrived there on the 9th. No lives were lost, and no one was seriously injured.

Upon the close of the evidence, Mr. Squarey, the learned counsel for the Board of Trade, put the following questions to the Court:—

1. What was the cause of the vessel coming into collision with an iceberg?

2. Whether the skid bridge was a proper place on which to station the look-out, and whether a good and proper look-out was kept?

. . . . . .

5. Whether prompt and proper measures were taken when the iceberg was seen?

6. Whether the vessel was navigated with proper care and seamanlike care?

7. Whether the master and officers are or either of them is in default?

In giving judgment in this important case, involving a serious disaster to a magnificent ship, carrying nearly four hundred people and a valuable cargo, the Court very carefully weighed the evidence and agreed unanimously, after much deliberation, upon the following judgment:—As to the 1st query put to the Court, the vessel came into collision with the iceberg owing to its vicinity not having been discovered in time to avoid it. In regard to the 2nd question, the Court was of opinion that the skid bridge was not a proper place on which to station the look-out on the evening in question. The evidence shewed that from 8 P.M. there was a heavy black cloud rising across the ship's bows and increasing in density, rendering it difficult to make out objects in time to avoid them, going as they were at so high a rate of speed. It was admitted that the skid bridge was not so good a place for a look-out as the main bridge, which was so much higher; but, of course, the forepart of the whale back was the best place,—and the painting of the whale back, which really was the reason why the look-out were stationed on the skid bridge, was not considered by the Court to be an adequate one. Upon the question of look-out, the Court found that the men stationed on the skid bridge had answered at 8.30 to the bell which then struck, and they did see an object ahead about 8.45 P.M., but, unfortunately, instead of at once reporting it to the officer of the watch, valuable time was lost while they consulted with each other about it, and they only discovered that it was an iceberg simultaneously with the second mate, and too late to avoid the collision. But the second mate was in a higher and better position for seeing, and the Court were compelled to conclude, after a very careful consideration of all the evidence, that had he kept a good look out he must have seen the iceberg sooner. As to the fifth query, the Court thought that everything was done after the ice was seen to avoid the collision. In regard to the sixth and seventh queries, the Court had no fault to find with the navigation of the ship except to repeat the remark as regards the master that they have already made as to the station of the look-out men. For this the master was solely responsible, and there was nothing in the state of the weather to render it necessary that they should be placed on the skid bridge. The circumstances of the paint was really no reason at all worthy of consideration. Certainly the danger from which the *Arizona* received serious damage, and which but for her extra strong build and from the fact that she struck the iceberg exactly where she did, might have caused her loss with all on board was a danger

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from which the master might fairly have thought himself to have been exempt. The independent and unanimous testimony of the experienced commanders, who were called by Mr. Gray Hill on the part of the master, must have satisfied every one who heard it that the occurrence of the iceberg in that quarter at that time of the year was exceptional in the extreme, and the Court have given to that testimony its fullest weight in favour of the master. But an iceberg was not the only danger which might have turned up. Only the day before, fortunately in daylight, they came across an abandoned vessel so closely that they read the name *Royal Arch* of Sunderland, and recorded it in the log book. The position of the look out is at all times by night one of paramount importance, especially on well-frequented seas and in vessels going at so high a rate of speed. While therefore giving every consideration to all that may fairly be urged on the master's behalf, and also bearing in mind his long service in the same employ, the Court felt compelled to find him in default for not placing the look out in the most efficient position.

March 22. The appeal came on to be heard before the President of this Division and the Judge of the Court of Admiralty, assisted by two of the Elder Brethren of the Trinity House Corporation.

E. C. Clarkson, for the appellant:—The Judge of the Court below proceeded under the 23rd section of the Merchant Shipping Act, 1862, which confers upon him the powers which were formerly vested in the Board of Trade under the 242nd section of the Merchant Shipping Act, 1854. The only portion of the 242nd section which can apply to the present case is the 2nd sub-section. That sub-section only confers jurisdiction to suspend or cancel the certificate of a master in cases where the loss or abandonment of or serious damage to any ship, or loss of life has been caused by his wrongful act or default. In the present case there is no loss of life, and there is no finding by the Court that the damage was caused by the wrongful act or default of the master. The finding is therefore bad on its face, and the Court cannot go behind the terms of the finding. But even if the Court looks behind the finding, there is no evidence to support any charge of a wrongful act or default on the part of the master, and certainly no evidence to show that any wrongful act or default of his caused the damage.

Muir Mackenzie, for the Board of Trade.

THE PRESIDENT. Having heard the valuable observations

which have been addressed to us upon the evidence in this case, and having had the opportunity of consulting with those, whose assistance we have the advantage of, on this occasion, we feel that we are in a position at once to state the opinion to which the Court has arrived. With regard to the first point which Mr. Clarkson has taken, that the finding of the Court below is not a finding which brings the case within the terms of the section of the Act which has been referred to, inasmuch as it does not find that the damage was occasioned by the fault of the master, we have only to say that we do not consider it necessary to determine that question upon this occasion, because we are of opinion that, putting the construction upon the language of the finding, which we think must be put upon it in order to make it a proper foundation for the suspension of the certificate, we interpret it as though it had stated that the default of the master was the cause of or contributed to the casualty. But we are of opinion that upon the facts it does not appear that there was any default on the part of the master which did in fact contribute to the casualty. Although I have said that we do not think it necessary to determine that question of law now, yet it is undoubtedly worthy of observation that neither in the formal report, nor in the reasons for it which have been given, does the learned judge state anything from which it can be inferred that he entertained the opinion that the default of the master was the cause of the casualty. The manner in which that part of the subject is dealt with tends rather to show that the learned judge's mind was running in a different direction, and that he was expressing only a general opinion upon the importance of there being the best look-out upon a vessel at all times; and he has expressed the conclusion which he, and those who assisted him, arrived at, that the master had, in fact, not used a sound judgment in that matter, but that he had put the look-out men in that which was not the best position.

It is unncessary for us to express any positive opinion upon that point. It may be, that if this had been the first investigation of the case, those gentlemen who assist us now, might not have taken so severe a view of the master's conduct as has been taken in the Court below. But I repeat it is unnecessary for us to express any

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opinion upon that point. Accepting the finding of the Court below, we have come to the conclusion that that blame which is attributed to the master did not cause or contribute to the casualty in question; and that is proved from a consideration of a very few facts in the case. It is obvious that from where the men were, on the skid bridge, they had an opportunity of seeing all before them, diminished only to the extent that the foremast would diminish the range of their vision, and further diminished to the extent that the stem head would obscure a portion of the sea's surface immediately in front of the vessel. But for all other purposes their means of looking out were just as complete where they were stationed as if they had been upon the whale back.

Now it is perfectly clear without attempting to form any accurate judgment as to what the time was, which elapsed between the first seeing of the object which afterwards turned out to be the iceberg, and the collision, that the men in the place in which they were did see the object for an appreciable time before the mate saw it; and it is clear that instead of doing what it was their duty to do—at once to call attention to something that was out of the ordinary course of things they consulted with one another. The language which it is proved they used tends to shew that their eyes had been upon the object before they gave the warning, because when the mate called out (which the look-out who has been examined says was a minute after he had seen it) their joint answer was, "We think it is ice;" shewing that they had been deliberating upon it

It being clear, therefore, that they had seen it for an appreciable time before they gave warning, and there being nothing in their position which prevented their seeing it at a greater distance than they did in fact see it, the cause of the collision, if it was possible for them to have seen it sooner than they did, must be attributed to the fact that they did not keep a good look out, or that they did not give warning soon enough of that which afterwards turned out to be an iceberg. The truth of the matter seems to be this—that they, like their superiors, did not contemplate the contingency of falling in with an iceberg in that direction, and therefore they too long ("unfortunately," as it is said in the judgment of the Court below) gave themselves up to the belief that it was

the cloud in the bosom of which the iceberg was, instead of seeing that it was the iceberg itself.

For these reasons, treating the judgment as being that the default of the master caused the accident, we are of opinion that it is incorrect, and we reverse that finding and the sentence that the certificate should be suspended, and we think the certificate should be returned to the master at once. I may add that it has occurred to the Trinity Masters, who desire that we should throw it out for the consideration of those whose interests are so much involved in cases of this kind, to suggest whether it would not be possible to afford some protection to look-out men stationed in a position similar to that in which the look-out men in this case would have been stationed if they had been on the whale's back.

SIR ROBERT PHILLIMORE. I am of the same opinion. I think that it is an incorrect finding that the master had by his conduct caused or contributed to the casualty. I am of opinion that the evidence has shown that he did not cause it or contribute to it. And in addition to the remarks of the President upon that matter, I would observe that the look-out did see an object ahead, but unfortunately did not at once report it to the officer of the watch, whereby valuable time was lost. The look-out are not before the Court, but the master is, and he is said to have caused the casualty. It however appears that the time was lost, not by any default of the master, but by the default of the look-out men and not by their being wrongly placed.

E. C. Clarkson, for the appellant, applied for the costs of the appeal. He submitted that the costs of the appeal were in the discretion of the Court, and that, in the circumstances they should be borne by the Board of Trade. He referred to the Shipping Casualties Rules, 1878, r. 21.

Muir Mackenzie, for the Board of Trade, opposed the application.

THE PRESIDENT. The question as to how the costs of the appeal should be borne in this case appears to be a question of some importance, and we reserve our decision on the point.

Cur. adv. vult.

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April 13. SIR ROBERT PHILLIMORE. The Court decided in this case, assuming the correctness of the finding of the Court below, that the master was in default in not placing the look-out men in the most efficient position, that it did not appear from the evidence that that default caused or contributed to the casualty. And we therefore reversed the finding and the suspension of the master's certificate. On this decision the question arose what direction we should give on the subject of costs, and, as this was the first appeal under the provisions of the Act of last session, 42 & 43 Vict. c. 72, we took time to consider whether we could lay down any rule as to costs in this and future cases.

We have come to the conclusion that where, as in this case, the action of the Court below in suspending the certificate proceeds on the invitation of the Board of Trade, we ought, where we think the certificate has been improperly suspended, to give costs to the successful appellant, unless we should be of opinion that he has been guilty of such misconduct as rendered an inquiry as to the suspension of his certificate reasonable. In the present case we do not consider that the master has been guilty of such misconduct, and we therefore direct that the Board of Trade pay him the costs of the appeal. It must be understood that where the appeal is unsuccessful the appellant will as a rule be condemned in costs.

Solicitors for appellant: *Gregory, Rowcliffes, & Co.*
Solicitor for the Board of Trade: *Murton.*

[IN THE CONSISTORY COURT OF DURHAM.]

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March 18.

IN RE ST. LAWRENCE, PITTINGTON.

Faculty—Reredos—Painting liable to be the Subject of Superstitious Reverence —Discretion of Ordinary.

The incumbent of a parish church applied to the ordinary for a faculty authorizing the decoration of the reredos of his parish church with a painted design, intended to represent the Adoration of Our Lord in Majesty by the Faithful, of which the following individual figures formed a part. In the centre of the three compartments into which the reredos was divided, a figure intended to represent Our Lord seated as King. In the right hand compartment figures representing St. Lawrence and the Blessed Virgin. In the left hand compartment figures representing St. Stephen and St. John; the four last-mentioned figures being represented with their faces turned towards the centre compartment of the reredos. The grant of the faculty was not opposed:—

Held, that there would be danger of the representation contained in the centre compartment of the reredos being abused by receiving "superstitious reverence," in the sense explained in *Clifton* v. *Ridsdale*, 1 P. D. at pp. 352, *et seqq.*; and that, therefore, the Court ought, in its discretion, to refuse to sanction its introduction into the church.

THIS was a cause of faculty promoted by the Rev. James Barmby, vicar of the parish of St. Lawrence, Pittington, in the diocese of Durham, for the purpose of obtaining a faculty authorizing the introduction of certain paintings, hangings, and embroidered curtains into the parish church of the same parish.

The case was heard at Durham on the 28th of February last, before the Chancellor of the diocese. (1)

The petitioner was represented by *Malcolm*, proctor.

No person appeared to oppose the grant of the faculty.

The Rev. J. T. Fowler, F.S.A., was examined orally in court on behalf of the petitioner. The result of the evidence, the nature of the paintings proposed to be introduced into the church, and the points taken in argument are stated in the judgment.

Cur. adv. vult.

March 18. THE CHANCELLOR. This is an application by the Rev. James Barmby, vicar of the parish of St. Lawrence, Pittington,

(1) H. Cowie, Esq.

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for a faculty to enable him to decorate with painting, to include figures, the arcading or reredos now existing against the east wall of the chancel of his parish church immediately above the Holy Table,—such figures representing respectively Our Lord in Glory, the Blessed Virgin, St. John, St. Stephen, and St. Lawrence,—in accordance with a design annexed to the petition; and also to place against such parts of the east, north, and south walls of the said church as are within the rails of the Holy Table hangings and curtains embroidered with representations of flowers. The churchwardens concur in the petition; and the Ecclesiastical Commissioners, who are in the position of lay rector, do not object; nor has any appearance been entered to the citation on the part of any parishioner. And there can be no doubt that the application itself results from a pious intention to beautify the church. All these circumstances, which may fairly be prayed in aid of the petition, concur to induce me to grant the faculty. But I must first be satisfied that the decoration would not be illegal, and that it would be a proper exercise of the discretion committed to me to sanction its introduction into a parish church.

It becomes necessary, therefore, to consider in detail the nature of the decoration itself; and for this purpose I will refer to the description of it given by the reverend witness, who was called in support of the petition.

The existing arcading or reredos is divided into three compartments or panels. The design for the centre compartment consists of one figure only, representing Our Lord seated as King, with a crown, orb, and sceptre, His right hand being elevated, with all the fingers extended, as in blessing. His head is encircled with a cruciferous nimbus, "indicating the Divine Person;" His feet rest on a rainbow, and He is surrounded by rays of glory. Except in respect of *all* the fingers of the right hand being extended, this representation is described as "the conventional mode of conveying the idea of Our Lord's eternal reign."

The design for the right-hand or north compartment represents St. Lawrence and the Blessed Virgin, the faces of both being turned towards the figure in the centre compartment. The Blessed Virgin is seated, with hands together, in "an attitude of adoring

companionship." St. Lawrence, who suffered martyrdom in the third century, is represented "with the tonsure, to shew that he was in Holy Orders," which is said to be "probably historically correct." His vestments, which are of a very ornate character, apparently comprising some which may not be now lawfully worn in a parish church, are described as those of "a deacon, represented in the way usually observed where conventionalities are at all attended to." He holds a gridiron (the instrument of his martyrdom); and he is introduced in reference to the dedication of the building, and "to shew that there are glorified Saints from every age of the Church."

The design for the left-hand or south compartment represents St. Stephen and St. John, the latter seated, the faces of both being turned towards the figure in the centre compartment, and their attitudes corresponding to those of the figures in the north compartment. St. Stephen is represented as a deacon, but without the tonsure, and with less ornate vestments than those St. Lawrence wears. He has stones in his hand, referring to the mode of his martyrdom. St. John is represented with a cup in his hand, as is said to be usual.

The whole design is described as being "meant to convey the idea of the adoration of Our Lord in Majesty by the Faithful."

The "usual" and "conventional" modes are explained by the same witness to mean "those which are usual in mediæval representations, and in modern ones of the same style, which came into vogue when the mediæval conventional mode was revived."

The same witness stated that in his opinion it was extremely unlikely that these representations would ever be regarded with superstitious reverence, though they might be regarded with superstitious dislike; but that, from his knowledge of the parish of Pittington, there was no reason to suppose that such was likely to be the case.

It was urged that, all the individual figures being representations of historical characters, the painting was sanctioned by the decision of the Privy Council in *Phillpotts* v. *Boyd* (1), whether the figures are grouped in representation of a historical

(1) Law Rep. 6 P. C. 435.

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scene or not; that if it might be lawfully introduced into the church at all, it might be lawfully placed immediately above the Holy Table; and further, that in these days of advanced education it was very unlikely that any of its figures, or indeed any images whatever, would be treated with superstitious reverence.

The Judicial Committee no doubt expressed an opinion in *Phillpotts* v. *Boyd* (1), that if such a decorative work as they were then dealing with, viz., a representation of historical scenes, which they declared was not in danger of being abused or liable to be impugned on the ground of exciting superstitious reverence, would be lawful in any other part of the church, there would be no contravention of the laws ecclesiastical by reason of its erection in the particular place it occupied. But, upon examining the judgment in order to ascertain how far the liberty established in that case extends, I am unable, after a very careful consideration of it, together with the subsequent cases of *Clifton* v. *Ridsdale* (2) and *Hughes* v. *Edwards* (3), to find any direct sanction given by either to representations other than those of the kind described as sculptured or painted representations of portion of the sacred history, such as the Transfiguration, the Crucifixion, and the Ascension of our Lord; the descent of the Holy Ghost on the day of Pentecost; or the gathering of the manna, the bearing of the grapes of Eshcol, and the like. And in any case it is still (according to the Judicial Committee in *Ridsdale* v. *Clifton* (2)) the duty of the ordinary to exercise his judicial discretion—so as to guard against the introduction into the church of things likely to be abused.

Again, in *Phillpotts* v. *Boyd* (1) the Judicial Committee seem to have carefully avoided sanctioning representations of isolated figures, for they took pains to explain that the necessary separation of our Lord from the gazing apostles in the representation of the Ascension did not destroy the connected character of that representation. And in *Hughes* v. *Edwards* (3), the present Dean of the Arches (who is also the Judge of the Provincial Court of Appeal from this Court) apparently drew a distinction between a

(1) 6 P. C. 435.
(2) 1 P. D. 316, at pp. 351, *et seqq.*; and (on appeal) 2 P. D. 276, at pp. 352, 353.
(3) 2 P. D. 361.

historical group and an isolated figure, considered as a fitting decoration for a parish church. (1)

Now, it was not and could not be contended that this work forms a connected representation of any historical subject, or of "the process of a story;" it is clearly distinguishable on that ground from "the numerous sculptured and painted representations of portions of sacred history" spoken of in *Phillpotts* v. *Boyd* (2) as to be found in many of our cathedrals and parish churches. It must, for the purposes of this case, be considered with reference to its several constituent parts, as well as with reference to the whole design, which, as already stated, is intended to convey the idea of the adoration of our Lord in Majesty by the Faithful.

The test of illegality in such a case is the probability or danger of any of the images being abused by receiving "adoration" or "superstitious reverence;" and such probability or danger is not necessarily to be measured by the opinion of an enlightened witness, who feels that he himself is safe from such emotions, and who regards a particular congregation as removed from the risk of entertaining them; it must rest chiefly on the character and the position in the church of the thing itself. (3)

And the question which I have to determine is whether—whatever be the purpose for which the painting is proposed to be introduced, and how fitly soever it may be described as a decoration—it is nevertheless likely to become anything more, and to be in danger of being abused by "superstitious reverence" being paid to any of the figures it contains. (4)

In considering this question, I have for my guide the construction put by the learned Dean of the Arches on the words "superstitious reverence," "adoration" and "worship," as used by the Judicial Committee in *Phillpotts* v. *Boyd*. (2) That learned judge said in *Clifton* v. *Ridsdale* (5) (where he was dealing with the crucifix) that these words are not intended to convey only the limited idea of a figure or object itself worshipped like a pagan idol. On the contrary, he understands these expressions as "intended to embrace the far more extended conception of worship,

(1) At page 370.
(2) 6 P. C. 435.
(3) 2 P. D. at p. 369.
(4) 1 P. D. at p. 351, and 2 P. D. at p. 368.
(5) 1 P. D. pp. 352, *et seqq.*

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adoration, or reverence paid to the Deity in the presence of, or before" the object or figure; and that "they must be taken to include all and every form or degree in which the object in question is made to take a place, or play a part, in the devotions which are paid to the Deity before it." He is careful to distinguish the belief in an idol of wood or stone from the practice of involving in devotional exercises outward and visible forms, as inculcated in the devotional books of the Roman Catholic creed; and he says "This is the 'fond thing vainly invented' of the twenty-second Article of Religion; and the mere fact of the existence of such a doctrine in that Church, among whose members high intellectual power and acquirement is rife, is to my mind a conclusive answer to the suggestion that the intellect or knowledge of the present day may be relied upon to take the place of those safeguards which it was the work of the Reformation to establish."

The parish church too is (as the learned judge points out) for the weak and ignorant, as well as for the intelligent and cultivated; and what is lawful in one is lawful in every parish church, and may be provided for every congregation, strong-minded or weak, instructed or ignorant.

The principles thus laid down by the learned Judge of the Provincial Court, and impliedly if not expressly approved in the highest Court of Appeal, I am bound to apply in dealing with this decoration. Applying them, then, in the first instance, to the consideration of the centre figure, I am at a loss to conceive what kind of image would be likely to take a place or play a part in the devotion paid to the Deity before it, and be in danger of being abused by receiving "adoration" or "superstitious reverence" in the sense explained by the learned Dean of the Arches, if such a figure as this would not, when placed immediately above the Holy Table, purporting as it does to represent Our Lord in Glory —not as He appeared on earth, but in the majesty of His eternal reign—with adjuncts intended to convey the idea of adoration.

With every desire to do all I lawfully may towards maintaining "the liberty established in *Phillpotts* v. *Boyd*" (2), and interpreting that phrase as widely as seems consistent with the judg-

(1) 6 P. C. 435.

ment, I cannot escape the apprehension—to my mind a just and reasonable apprehension—that this decoration, introduced immediately above the Holy Table of a parish church, might lead to "adoration" or "superstitious reverence" in the sense already explained being paid to its principal figure. I have therefore no choice (according to *Ridsdale* v. *Clifton* (1)) but to hold that there would exist that danger of its being abused which would be fatal to its legality if it were set up in the church; and under these circumstances it is my duty to exercise my discretion so as to guard against its introduction.

Cases have been brought to my notice as precedents in support of the petition, viz.: a reredos at West Rainton, another in St. Cuthbert's, Darlington, and some wall-paintings in the apse of St. James's, Morpeth. With regard to West Rainton and Darlington, it is unnecessary to say more than that—whatever the representations there may be—no faculty appears to have been obtained from this Court in either case. And as to the Morpeth paintings, they do not appear to me from their character or position likely to be abused by receiving superstitious reverence. None of these, therefore, constitutes in my opinion an authority in favour of the present application.

My attention has also been drawn to a representation of our Lord in the centre of the east window of this noble cathedral (2), at a height of about sixty-five feet above the ground, and to certain images near the organ; but I cannot regard decorations in such positions as authorities for my granting a faculty for this painting in the building and place where it is proposed to be introduced.

Taking the view which I do of the principal figure, it is unnecessary that I should add anything with regard to the others.

For the reasons stated, I decline to grant a faculty for the introduction of this painting into Pittington Church conformably to the design annexed to the petition.

A faculty may issue for the hangings and curtains.

Proctors for petitioner: *Jones & Malcolm, Durham.*

(1) 2 P. D. at pp. 352, 353.

(2) The Consistory Court is held in the Galilee Chapel of the cathedral.

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Feb. 18, 25.

[IN THE COURT OF APPEAL.]

THE ALINA.
BROWN *v.* THE ALINA.

Admiralty Jurisdiction of County Courts—Breach of Charterparty—County Courts Admiralty Jurisdiction Act, 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act,* 1869 (32 *&* 33 *Vict. c.* 51), *s.* 2.

The 2nd section of the County Courts Admiralty Jurisdiction Amendment Act, 1869, gives the county courts jurisdiction in cases of claims arising out of charter-parties or other agreements for the use or hire of ships, although the Court of Admiralty may have no original jurisdiction in such cases.

Cargo ex Argos (Law Rep. 5 P. C. 134) followed.

Simpson v. *Blues* (Law Rep. 7 C. P. 290) and *Gunnestad* v. *Price* (Law Rep. 10 Ex. 65) disapproved.

For report of this case, see 5 Ex. D. 227.

March 9.

ANSDELL *v.* ANSDELL, SLEDDALL, AND CROCKETT.

Settlements—Variation—Retrospective Operation of Matrimonial Causes Act, 1878.

An ante-nuptial settlement having been executed a decree nisi was afterwards obtained for dissolution of the marriage of the parties, and before the decree was made absolute the Matrimonial Causes Act, 1878, was passed, allowing the Court, notwithstanding that there are no children of the marriage, to exercise the powers vested in it by 22 & 23 Vict. c. 61, s. 5 :—

Held, that the Court had jurisdiction to vary the settlement though there was no issue of the marriage.

THIS was an application to vary an ante-nuptial settlement.

Prior to the marriage of the petitioner and respondent the petitioner had settled a policy of insurance upon the respondent, upon the trusts hereinafter referred to in the judgment. A decree nisi in the suit was pronounced on the 9th of May, 1878, dissolving the marriage by reason of the respondent's adultery. On the 27th of May following the Act, 41 Vict. c. 19 (the Matrimonial Causes Act, 1878), s. 3 (1), came into operation, and on the 12th of November following the decree nisi was made absolute.

(1) This section is set forth in the judgment.

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The usual petition was afterwards filed for variation of the settlement, and the registrar reported that, assuming the Court had the necessary jurisdiction, the respondent's interests under the settlement ought to be extinguished.

March 2. *Middleton*, for the respondent, in objection to the report. There being no children of the marriage the Court has no jurisdiction in this case under 22 & 23 Vict. c. 61, s. 5 (1), and the Matrimonial Causes Act, 1878, gives the Court no power, as the settlement was executed and the suit commenced before the passing of that Act. An Act is only retrospective where it affects practice and procedure and not rights. At the time of the passing of the latter Act the respondent had a right to the settlement, and the Court is asked to extinguish that right by reason of some offence committed before the date of the Act. The offence must be subsequent: *Hitchcock* v. *Way* (2); *Charlesworth* v. *Holt*. (3)

Inderwick, Q.C., and *Pritchard*, for the petitioner. The Act is remedial, and therefore retrospective in its operation, unless there is in the Act a clear intention to the contrary: *Page* v. *Bennett* (4); *The Ironsides* (5); *Binns* v. *Hey* (6); Maxwell's Construction of Statutes, 201. The words of the Act itself show that a retrospective operation was intended, as it permits the Court to exercise the powers of the previous Act.

Cur. adv. vult.

March 9. THE PRESIDENT. This was a suit by a husband for dissolution of marriage. A decree nisi was pronounced on the 9th of May, 1878, and this decree was made absolute on the 12th of November, 1878. The petitioner by his marriage settlement assigned to trustees a policy on his own life for 1000*l.* for the benefit of the wife for her life or widowhood, and after her death or second marriage without child or issue of deceased child by the said marriage to the husband's next of kin, and the petitioner covenanted with the trustees to keep up the policy. There were no

(1) This section is set forth in the judgment.

(2) 6 Ad. & E. 943.

(3) Law Rep. 9 Ex. 38.

(4) 29 L. J. (Ch.) 398.

(5) 1 Lush. 458.

(6) 1 D. & L. 661.

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children of the marriage. After the dissolution of the marriage the petitioner consented to an order being made by the Court that he should pay to the respondent 150*l.* per annum during their joint lives, so long as she should remain unmarried and lead a chaste life, and the petitioner presented a petition for the variation of the settlement by extinguishing the interest of the respondent in the policy.

Assuming that I have power to grant the prayer of this petition, I think it just and reasonable that I should do so, but it is contended that the Court has not such power. This depends on the construction to be put on the 5th section of 22 & 23 Vict. c. 61, and the 3rd section of 41 Vict. c. 19.

By the first of these it is enacted that the Court after a final decree of . . . . dissolution of marriage may inquire into the existence of ante-nuptial . . . . settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit.

It was held in the case of *Corrance* v. *Corrance* (1) that the Court had no power to deal with marriage settlements under this section, unless there were issue of the marriage living at the time of the application to the Court for alteration of the settlements. If the law had remained unaltered I must, on the authority of this case, have rejected this petition, because there are no children of the marriage which has been dissolved, but by the 3rd section of the Matrimonial Causes Act, 1878 (41 Vict. c. 19), which came into operation on the 27th of May, 1878, it is enacted that "the Court may exercise the powers vested in it by the provisions of s. 5 of 22 & 23 Vict. c. 61, notwithstanding that there are no children of the marriage."

It was contended that this enactment does not give the Court power to deal with this marriage settlement, because the decree nisi was pronounced before the Act came into operation, and that it would be giving a retro-active effect to the enactment if the prayer of this petition was granted, and that it did not appear

(1) 1 P. & D. 495.

that the section was intended to have a retrospective operation. Several cases were cited illustrative of the well known maxim referred to by Lord Coke in 2 Inst. 292, "Nova constitutio futuris formam imponere debet, non præteritis."

Little assistance can be derived from these authorities in determining in the particular case, whether the legislature intended that the new enactment should be operative with respect to pending litigation. The general rule no doubt is that the law, as it existed when the action was commenced, must decide the rights of the parties in the suit, unless the legislature expressed a clear intention to vary the relation of the litigant parties to each other; *Hitchcock* v. *Way*. (1) The question in each case must be whether the intention of the legislature is clearly manifested. It is a rule in the construction of statutes that the natural and ordinary meaning must be given to the language of an Act of Parliament, unless it would lead to some manifest absurdity, or injustice which it cannot be presumed the legislature intended. Here the language of the section is peculiar, it does not purport to give a new power, but says that the Court may exercise its existing powers notwithstanding the absence of the conditions on which they had been held to depend. This has more analogy with a legislative interpretation of the fifth section, than a "nova constitutio." The Court is still acting under the authority of that section, and I cannot see that this leads to any injustice to the respondent. But if the coming into operation of the third section of the later Act is to be regarded as making a new point of departure, it did not alter the law, applicable to the proceedings which were then pending against the respondent. These were solely for dissolution of the marriage, and the new enactment merely enlarges the consequences which might follow on a future final decree for dissolution, when the time should arrive for the Court to exercise its discretion in determining what would be fit to be done in the circumstances of the case. Proceedings for variation of the settlement are totally distinct from those for the dissolution of the marriage. It is only after a final decree of dissolution that the Court can be set in motion by a new petition to inquire into the existence of settlements and to order a

(1) 6 Ad. & E. 952.

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different application of the settled property. In the present case this new enactment came into force before the final decree. The Court was therefore armed with this enlarged power long before the present proceedings were commenced or would have been commenced.

On these grounds I am of opinion that the Court is entitled to make the order asked for, and conceiving it to be fit and just to do so, I confirm the registrar's report and extinguish the respondent's interest in the policy.

Solicitors for petitioner: *Pritchard, Englefield, & Co.*

Solicitors for respondent: *Ayrton & Briscoe.*

April 6.

BAKER *v.* BAKER.

Dissolution of Marriage—Lunatic Petitioner—Committee.

The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage.

Such a suit may be instituted by the committee of the estate of the lunatic.

Affirmed by Full Ct. 6 P.D. 12

THIS was a demurrer to a petition by John Alfred Baker, of the City of Bristol Steam Saw Mills proprietor, the committee of the estate of William Baker, a person of unsound mind, so found by inquisition, and of the said William Baker, by the said John Alfred Baker, his guardian.

The petition alleged the marriage of William Baker with Gertrude Blanche Baker, the respondent; their cohabitation; that there had been no issue of the marriage; that the respondent had committed adultery; and that the petition is presented by the leave and under the direction of the right honourable the Lords Justices, and the petition prayed for a dissolution of the marriage and further and other relief.

The respondent, in her answer, denied the adultery, and alleged:—2. That the petitioner is not permanently insane. 3. That the petition is bad in substance.

The points for argument were:—

1. That the petition does not allege that the petitioner is permanently insane, nor that there is no prospect of his recovering within a reasonable time.

2. That it is not competent to the petitioner during his lunacy to present a petition to this Court for a dissolution of his marriage, and that the Court cannot proceed to hear and determine the matters alleged, or to pronounce a decree of dissolution of marriage thereon.

March 6. *Dr. Deane, Q.C.*, and *Bayford*, in support of the demurrer. *Mordaunt* v. *Moncreiff* (1) does not apply. That was the case of a lunatic respondent. In *Woodgate* v. *Taylor* (2), as appears by the note to the case reported in 30 Law Journal, P. & M. 197, the Lords Justices were of opinion that it was not proper for the committee of a lunatic to petition for a dissolution of the marriage, but that the proper remedy was a judicial separation. *Bawden* v. *Bawden* (3) also do not apply as those were suits for judicial separation. In such cases no affidavit is necessary from the petitioner, but the 41st section of the first Divorce Act imperatively requires it in suits for dissolution of marriage. A man does not necessarily wish for a dissolution of his marriage because his wife has committed adultery. It is a question for him alone whether he so feels the wrong, and he alone ought to decide. Unless there is, which there is not, something in the Act which shews that the legislature intended to give the power to another person to sue on behalf of the husband the Court ought not to proceed to give a remedy which is irrevocable. Besides the suit is by the committee of the estate, whereas the committee of the person, if any one, is the proper party to sue.

Inderwick, Q.C., and *Searle*, in support of the petition. In construing the Act, there is no difference between a petitioner and respondent, and the same principles are applicable to a suit either for dissolution of marriage or judicial separation. If the petitioner can ask for any he can ask for all the relief which the Court can give. The words of the statute (s. 27) are quite general and apply to "any husband" and "any wife" resident or domiciled here: *Niboyet* v. *Niboyet*. (4) In *Parnell* v. *Parnell* (5), and *Ports-*

(1) Law Rep. 2 P. & D. 112; S. C., on appeal, Law Rep. 2 H. L., Sc. 374.

(2) 2 Sw. & Tr. 512; 30 L. J. (P. & M. 197.

(3) 2 Sw. & Tr. 417; 31 L. J. (P. & M.) 94.

(4) 4 P. D. 22.

(5) 2 Hagg. Con. 169; S. C. 2 Phillim. 158.

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mouth v. *Portsmouth* (1), the marriage was annulled in a suit on behalf of a lunatic. The question of personal option may well be left to the Lords Justices to consider on behalf of the lunatic. In many cases as, e.g., where there are settlements, a judicial separation would be a very inadequate remedy for a wife's adultery. In *Wells* v. *Cottam* (2) a marriage was set aside against the wish of both husband and wife.

Dr. Deane, Q.C., in reply.

Cur. adv. vult.

April 6. THE PRESIDENT. The first-named petitioner in this case is the committee of the estate of William Baker, a lunatic, and he prays that the marriage of the lunatic may be dissolved on the ground of his wife's adultery.

The petition alleges that it is presented by the leave and under the direction of the Lords Justices, and that the said William Baker is a person of unsound mind so found by inquisition, and that there is no present prospect of his recovery.

The respondent has denied the adultery, and has also demurred to the petition on the grounds that it does not allege that the petitioner (by which is meant the said William Baker) is permanently insane, nor that there is no prospect of his recovering within a reasonable time: and further, that it is not competent for the petitioner during his lunacy (by which is meant the committee during the lunacy of the said William Baker) to present a petition for dissolution of the marriage, and that the Court cannot proceed to hear and determine the matter alleged in the petition, or to pronounce a decree of dissolution therein, and lastly, that the action being for personal relief, ought not to be brought by the committee of the estate.

The broad question raised upon this demurrer is, whether it is competent for any one to institute on behalf of a husband, who is incapacitated by insanity from giving his assent to it, a suit for the dissolution of the lunatic's marriage.

This most important question was touched upon, though not decided, in the case of *Mordaunt* v. *Moncrieff* (3) before the House

(1) 1 Hagg. Eccl. 355. (2) 3 Sw. & Tr. 364, 593.
(3) Law Rep. 2 H. L., Sc. 374.

of Lords. It now becomes necessary to determine whether or not there is a distinction between the case of a lunatic being made a respondent in a suit for dissolution of marriage, and that of the committee of a lunatic bringing such a suit on the lunatic's behalf—whether or not to the proposition that a lunatic may be sued in such an action it is a corollary that a lunatic may sue.

The learned judges who took part in the case of *Mordaunt* v. *Moncrieff* (1) in its several stages all agreed that the answer to the question there raised must be sought exclusively in the Act of Parliament by which the Divorce Court was established; and the same remark applies with equal force to the point now under consideration. The conflicting views taken on the subject of the application of the statute to the case of a lunatic respondent may be thus summarized. Those who thought that proceedings could not be taken against an insane person argued thus. The legislature has instituted a new tribunal and new proceedings for the determination of questions not hitherto cognizable by English law. The statute requires the parties or entitles and empowers them to do certain things, partly in the interest of the parties themselves, partly in the interest of the public, which can only be done, or effectually done, by sane persons: yet no provision is made in case of the respondent being insane. The inference to be drawn from this state of things is that the new procedure was not intended to apply to the case of a respondent being a lunatic, and that such a case must be left to be dealt with, as it must have been before the Act, by application to the House of Lords, which is still open to all persons for whom the Act does not afford a remedy. On the other hand, those who hold that the proceedings might be maintained against a lunatic respondent argued thus: true it is the legislature has instituted a new tribunal and new proceedings for the determination of questions not hitherto cognizable by English law, but this tribunal and these proceedings are not criminal, but civil, and therefore, though no provision is made for the case of a lunatic respondent, by analogy to other civil proceedings, a lunatic respondent is liable to be sued, and the fact that the insanity may preclude an effectual defence being set up must be regarded as a misfortune resulting

(1) Law Rep. 2 P. & D. 112; on appeal Law Rep. 2 H. L., Sc. 374.

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from the respondent's condition, and does not affect the petitioner's right to sue, any more than the death or insanity of a material witness for the defendant.

The latter of these two contentions prevailed in the House of Lords, and I am of course bound, not only by the actual decision, but by the principles on which it proceeded, and if those principles embrace not only the case of a lunatic respondent, but that of a lunatic petitioner, I must apply them in the present instance. It is remarkable that all those judges who thought that proceedings could be maintained against a lunatic were also of opinion that they might be maintained on behalf of a lunatic; while, on the other hand, those who thought that the proceedings could not be maintained against an insane person were of opinion that the proceedings could not be taken on behalf of such a person.

In *Mordaunt* v. *Moncrieff* (1) the judges consulted were asked the specific question, whether proceedings for dissolution of a marriage could be instituted or maintained on behalf of a husband who before the proceedings were instituted had become incurably insane.

Mr. Justice Brett says: "There are acts specifically required to be done by a petitioner which make the procedure more clearly in language applicable to the case of an insane petitioner." I shall for convenience adopt the expression "insane petitioner" used by the learned judge, but it is to be observed that in this and analogous cases the committee of the lunatic is the petitioner.

Mr. Justice Keating says: "Looking to the words of the statute, it is difficult to suppose the legislature ever contemplated a lunatic being a petitioner;" and, after stating his opinion that suits before the Act for nullity or judicial separation could have no application to a proceeding for dissolution of marriage, he concludes, "I answer your Lordships' question, therefore, by saying that a lunatic cannot be a petitioner for a dissolution of his or her marriage."

In the Court below (2) the learned judge had expressed his view more fully on this point, and I refer to his judgment for an explanation of the grounds of his opinion.

The language of Lord Penzance has a direct application to the present case, because he argues, from what he conceives to be the

(1) Law Rep. 2 H. L., Sc. 374. (2) Law Rep. 2 P. & D. 112.

impossibility of distinguishing the cases of a lunatic petitioner and a lunatic respondent, that the proceedings under the Act could not apply to the latter, while he admits that if these proceedings can be taken against a lunatic, they may also be taken on behalf of such a person. He says (1): "It is to be observed at the outset that there are no words applicable to the case of lunacy, either of the petitioner or of the respondent. If suits were intended to be entertained by and against such persons, it would be reasonable to look for some provisions by which their friends or relations might act for them and protect their interests. But there are none such, nor indeed any special provisions or machinery for the conduct of such suits. If the statute applies to lunatics at all, it deals with them in all respects like other persons. Accordingly, the lunatic petitioner must present a petition and accompany it by an affidavit sworn by himself as to the truth of its allegations. On this s. 41 is express."

On the other hand, the Lord Chief Baron says: (2) "The alternative question propounded by your Lordships, whether a petition for a dissolution of marriage can be preferred on behalf of a lunatic husband or wife seems to me to involve many considerations essentially different from those which arise in the present case; but I think, as a matter of law, a committee or guardian may lawfully sue by petition under the Act." And in this opinion Denman, J., and Pollock, B., concurred; and it was intimated that Sir Samuel Martin, who had heard the arguments, but had since retired from the bench, also shared the opinion of those learned judges.

Turning to the speeches of the learned lords who took part in the decision of the case, I find that Lord Chelmsford abstained from expressing an opinion on the point now arising for my determination. He says: "The alternative question submitted to the judges, whether proceedings for the dissolution of a marriage can be instituted on behalf of a lunatic husband or wife is unnecessary to be determined, and as it involves considerations very different from those which apply to the cases where the respondent is a lunatic, and as there may be conditions annexed by the Act to the presenting a petition for a divorce with which a lunatic may be

(1) Law Rep. 2 P. & D. at p. 129. (2) Law Rep. 2 H. L., Sc. 383.

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unable to comply, I should not like to express any opinion without hearing a fuller argument upon the question than was necessary upon the hearing of this appeal."

Lord Hatherley, however, clearly indicates that his opinion is that proceedings might be taken on behalf of a lunatic petitioner. He says: "Great stress has been laid in the Court below, as well as in some of the opinions delivered in your Lordships' House, on the supposed incompatibility of the enactments with the supposition of any principal respondent, or, indeed, any petitioner being a lunatic or a person incapable from insanity of acting on his or her own behalf. The 41st section, for instance, is pointed out as regards the petitioner, which requires him or her to verify the petition by affidavit. But be it observed that this section applies to petitions in suits for nullity, judicial separation, or jactitation of marriage, as much as to those for divorce a vinculo. Now the suits for nullity, judicial separation, and jactitation of marriage had long been cognizable in Ecclesiastical Courts, and suits for nullity, as in the *Portsmouth Case* (1), often proceeded on the insanity of him who applied for a decree. All these are now transferred to the new Court, and are directed by the 22nd section of the Act to be conducted as heretofore with regard to procedure, and this 41st section cannot be taken to have stayed such suits from proceeding by the simple fact of requiring an affidavit, which, in the *Portsmouth Case* (1), for instance, could not have been made."

It appears from these quotations that the weight of opinion, though not amounting to judicial decision, largely preponderates in favour of these proceedings being maintainable.

This being the state of the authorities upon the question, the duty of determining the question in the first instance now devolves upon me.

No one can feel more strongly than I do the difficulty of administering the law of divorce where one of the parties is insane. One of the peculiarities of that law is, that the public is deemed to be interested in the full disclosures of the relation of the litigants to one another, and of the conduct of the complaining party. This was so strongly felt, that as the first Act did not

(1) 1 Hagg. Eccl. 355.

arm the Court with sufficient power to investigate the petitioner's antecedents, a public officer was afterwards authorized to intervene in the proceedings.

To allow the suit to proceed against an insane person is an abandonment of the most obvious and, in most cases, the only means of obtaining that information which the legislature has considered the public welfare requires. With regard to the interests of a respondent, although the proceedings are not criminal, yet the same principles of justice and humanity which introduced into the criminal law the provision that no insane person can be called upon to answer a charge of having committed a crime when sane, seem equally applicable to proceedings against a respondent, and especially a woman for dissolution of marriage on the ground of adultery. These arguments cannot be more forcibly expressed than they are in the judgment of the Lord Chief Baron, but he and the judges who concurred in his opinion, as well as Lord Hatherley, considered that those arguments must yield to what they deemed the plain provisions of the Act of Parliament, that a petitioner should be absolutely entitled to a decree of dissolution of marriage upon proving certain facts, though the respondent might be precluded by mental incapacity from offering any defence.

The difficulties which are presented in the case of a lunatic petitioner are indeed different in character, but they do not appear to me to be more formidable than those to which I have adverted in the case of a lunatic respondent. If the proceedings are in the one case to be put on the same footing as other civil proceedings, I can see no reason why they must not be so in the other. If an insane respondent must defend herself as best she may by means of a guardian ad litem, I do not see where the Act has indicated that an insane petitioner may not institute a suit for divorce through his committee, as he might sue for the breach of an ordinary contract. The only provision which has been pointed to as having such an effect is the 41st, which requires the petitioner to verify his or her petition by affidavit, so far as he or she is able to do so, but, as Lord Hatherley has pointed out, this section is equally applicable to suits for nullity and judicial separation, which could undoubtedly, before the Act of 1857, be

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instituted on behalf of a lunatic by his committee. It cannot be supposed that it was intended, by the mere provision that the facts should be verified by the petitioner's affidavit, to prevent for the future such suits being instituted. I entertain no doubt that I have power in such cases to allow the husband's committee, who would in fact be the petitioner on the lunatic's behalf, to make the required affidavit, and that is what has been done in this case without objection on the part of the respondent.

Another argument has been urged to which undoubtedly great moral weight must be allowed, that the right to sue for a divorce is personal and cannot be exercised by any but the individual himself who has been wronged. He might, if he were sane, condone his wife's offence, he might be conscious of matrimonial offences committed by himself which would legally debar him from obtaining a decree, which his conscience might therefore prevent his asking for. But these arguments are equally applicable to suits for judicial separation, which it is conceded may be maintained on behalf of lunatics. It has however been urged, and for this the great authority of Lord Stowell has been invoked, that in these cases the lunatic, if he recovered his senses, might forgive his wife and take her back, whereas in case of dissolution the mischief, if he should regard it as such, might be irreparable, for his divorced wife might have married some one else, but this argument should rather be addressed to the discretion of the Lords Justices, without whose consent these proceedings cannot be taken, than urged on this occasion, for it is to be observed that proceedings for judicial separation would in some cases be productive of as great a personal hardship to a lunatic husband as a dissolution of his marriage. Though insane on some subjects he might be capable of deriving comfort and advantage from the society of his wife, and might be willing to overlook her frailty in consideration of her kindness to himself or his children. Yet there is only the exercise of the discretion of the Lords Justices to prevent such a husband having an erring, but perhaps still beloved, wife, for ever debarred from access to him. I should add that the probability of a husband forgiving his wife's adultery is not to be regarded as remote. It is a fact of everyday occurrence, as the records of this Court abundantly shew.

On the other hand it cannot be denied that, if reasons of expediency are to be regarded, great wrong might arise from holding that no proceedings for divorce can be maintained against the adulterous wife of a lunatic. She might be left in possession of property settled on her by her husband, which she and her paramour might enjoy to the exclusion of the lunatic. She might exercise powers of appointment in favour of the paramour or the children of her and his adultery, a spurious offspring might be foisted upon her husband and his family, by which the devolution of estates or titles might be diverted in favour of illegitimate objects. These evils would only be avoided by a dissolution of the marriage.

The consideration which has most pressed upon me in support of the respondent's contention is this: It is well known that it is a part of the religious faith of all Roman Catholics and of many members of the Church of England that the bond of marriage is indissoluble. It is certainly startling that if a member of the Roman Catholic or of the Anglican Church, believing in his conscience that the dissolution of a marriage is unlawful in the sight of God, should have the misfortune to become insane, the committee of his estate might be authorized on account of some question of money to obtain a decree dissolving his marriage. And I do not feel that this consideration is satisfactorily disposed of by the fact that the Lords Justices have a discretion in the matter, for how can they or any human tribunal determine what might be the conscientious conviction of any one on such a subject? But this and all other considerations of a like kind appear to me to be overpowered by the decision of the House of Lords, which seems to amount in substance to this, that as proceedings for divorce are civil, though no provision for the case of lunatics is contained in the Act, recourse must be had in such a case to the ordinary forms of civil courts where lunatics are litigants. I am unable to see any distinction between the cases of lunatic petitioners and lunatic respondents, and I adopt the language of Lord Penzance, "I say lunatic petitioners as well as respondents, for there is no distinction made in the Act. The words throughout are quite general, and there is no middle ground between the two opposite opinions that these words include lunatics or exclude them all together."

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For these reasons I am of opinion that the judgment of the House of Lords is, by necessary implication, binding on me in the present occasion, and I must therefore hold that the insanity of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage.

It only remains for me to consider the minor questions which were raised on the argument.

First, it is said that it is not alleged in the petition that William Baker was incurably insane, or that he will not recover within a reasonable time. But what more can be said on such a subject than that there is no present prospect of his recovery? This is equivalent to saying that there is no present prospect that he will recover within a reasonable or any other time, although it cannot be alleged that it is impossible that he may after some unknown and unascertainable period be restored to reason.

No application has been made to me to postpone the trial for the purpose of being informed whether there is a probability of the lunatic at some future time being sane, but the demurrer is based on the assumption that while he remains insane the suit cannot be maintained. If the Court is to hold its hand till all hope is extinguished it must wait till the Greek Kalends.

Another point which the learned counsel for the respondent has taken is, that the right to institute a suit for dissolution of marriage, if it exist at all, belongs not to the committee of the estate but to the committee of the person. I think that this is not a question of law, but for the discretion of the Lords Justices. They probably considered that, as all litigation involves liability to costs, it belonged rather to the keeper of the purse than of the person, to control the proceedings by which they would be incurred.

Solicitors for petitioner: *Thomas White & Sons.*

Solicitors for respondent: *Surr, Gribble, & Bunton.*

HARVEY, otherwise FARNIE, *v.* FARNIE.

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April 22.

Marriage in England—Divorce in Scotland—Validity.

The English Divorce Court will recognise as valid the decree of a Scotch Court dissolving the marriage of domiciled Scotch persons, though the marriage was solemnized in England and the woman was English prior to her marriage.

Semble, in some cases the English Divorce Court might recognise as valid the decrees of a foreign court dissolving the marriages of English persons.

This was a petition for declaration of nullity of marriage. The respondent Henry Brougham Farnie, a domiciled Scotchman, married on the 13th of August, 1861, in England, an Englishwoman. After their marriage they resided in Scotland until 1863, when the wife obtained a decree from a Scotch Court for dissolution of the marriage by reason of his adultery. On the 31st of May, 1865, his former wife being still alive, he married the petitioner at All Souls Church, Marylebone. These facts having been proved,

Benjamin, Q.C., Ffooks, Q.C., Inderwick, Q.C., Bayford, and *Ffooks,* for the petitioner: The second marriage is null and void. The Scotch Court could not annul an English marriage. This was decided in *Lolley's Case.* (1) That case has never been overruled, and has been recognised or followed in *Tovey* v. *Lindsay* (2); in *McCarthy* v. *De Caix* (3); in *Birtwhistle* v. *Vardill* (4); *Dolphin* v. *Robins* (5); *Shaw* v. *Gould* (6); *Shaw* v. *The Attorney-General* (7); *Pitt* v. *Pitt.* (8) In *Warrender* v. *Warrender* (9) the head-note is wrong, but that case does not apply, as there the marriage was Scotch.

Dr. Deane, Q.C., Winch and *Ward,* for the respondent were not called upon.

The President. In this case the respondent, a Scotchman by birth and domiciled in Scotland at the time of his marriage,

(1) Russ. & Ry. 237.
(2) 1 Dow. 117, 124.
(3) 2 Russ. & My. 614.
(4) 2 Cl. & F. 571; 7 Cl. & F. 895.
(5) 7 H. L. C. 390, 413, 414, 419.
(6) Law Rep. 3 H. L. 55, 70.
(7) Law Rep. 2 P. & D. 156.
(8) 4 Macq. 627.
(9) 2 Cl. & F. 488.

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married an English woman on the 13th of August, 1861, at Cardigan, and immediately after his marriage returned with her to Scotland. He remained domiciled there until after the year 1863, when his wife obtained in a Scotch Court a decree for divorce a vinculo upon the ground of his adultery. After the dissolution of the marriage he contracted a second marriage with the petitioner in England in the year 1865, and the petitioner now seeks to have it declared that this marriage was null because the respondent had a wife living at the time—in other words, that the Scotch divorce was inoperative at least as to England—and therefore that the first wife must be held by an English Court to be the respondent's true wife.

The argument which has been addressed to me amounts to this: that because the marriage was celebrated in England, it was indissoluble in Scotland, or indissoluble except for some cause for which it could have been dissolved in England.

But it must be remembered that for the purposes now under consideration a Scotchman is in precisely the same position as any foreigner, and although when he comes into this country without changing his domicile, he is bound to pay obedience to the English law, and amongst other things, can only contract a marriage here in accordance with its requirements: yet from the moment that he leaves this country and goes back to his own, he owes no further allegiance to the English law, and from that time forward his rights and duties and status can only be regulated by the law of the country of his domicile so long as he remains there.

In this case the respondent married an English woman, but that has no bearing upon this question, because it is clear that the wife acquired the domicile of her husband. This is not a mere fiction; it is the literal and absolute fact. A woman when she marries a man does in the most emphatic manner elect to make his home hers; and, accordingly, when the respondent returned to his native country with his wife they took with them, so to speak, their status of married persons and entirely withdrew themselves from the English jurisdiction; they took with them everything connected with the marriage, except the superfluous evidence of the parish register, and from that time forth while the man remained in Scotland, the place of his domicile, English

law had nothing whatever to do with him. The Scotch Court, therefore, was possessed of the entire subject with which it had to deal. Both the man and the woman were there, and their status was, as I have said, transferred to that country, because the marriage was entered into with a view to its obligations being discharged in the Scotch home.

By the law of Scotland a marriage of this kind, although celebrated in England, can be dissolved by the Scotch Courts: *Warrender* v. *Warrender*. (1) The principles of that decision have been fully expounded by Lord Brougham, at pages 532–35 of his judgment, and need no justification from me. Is this Court then bound to recognise the dissolution of the marriage by the Scotch Court where the contract was celebrated in England? From the time when the husband and wife left this country their connection with England ceased. While they remained in the country of the husband's domicile they were subject only to the laws of that country, and a sentence of the Court before which the question of dissolving the marriage could alone be brought is like a judgment in rem. It was not merely a decision inter partes, but operated upon the status itself; it unmade that status, and rendered the husband—who up to that time had been a married man—an unmarried man, and accordingly into whatever country he might afterwards go he carried with him that status of an unmarried man, which had been constituted by the only Court of competent jurisdiction before which it had been brought, or before which it could then be brought.

It is perfectly true that in some cases we do not recognise the status derived from the country of the domicile where such status would interfere with our views of the interests of our country, or our subjects, or of morality and the highest justice. I refer, for example, to the status of slavery, but a decree of divorce has never been put upon any such grounds. It would always have been impossible for us to do so with consistency, not only now since the constitution of this Court, but also previously, inasmuch as divorces could even then have been obtained here, although not by an appeal to the ordinary tribunals. Where, as in this case, the divorce is decreed by the Court of the country where the

(1) 2 Cl. & F. 488.

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parties were domiciled, we have nothing to do with the grounds upon which the tribunals of that country may proceed in declaring what shall entitle the man or woman to have his or her marriage dissolved.

It appears to me, therefore, upon general principles that we are bound to recognise the change of status brought about by a decree of divorce in another country, where that decree applies to the domiciled subjects of that country. But though these are the general principles which govern the subject, I might be bound by some particular provision of the municipal law of England to proceed not in accordance with the generally received principles of jurisprudence, but upon some special ground applicable to England alone. That there is no statute law upon the subject is clear, and the only case which has been referred to, as having the effect of compelling me to decide contrary to the principles which it appears to me govern this subject, is *Lolley's Case*. (1)

It is somewhat remarkable that the exact words of the decision in that case have been lost sight of. The judges held the conviction right, being unanimously of opinion "that no sentence or act of any foreign country or any state could dissolve an English marriage a vinculo matrimonii, for grounds on which it was not liable to be dissolved a vinculo matrimonii in England." This judgment like every other must be taken with reference to the facts upon which it proceeded, and if so considered amounts to no more than this: that no sentence or act of any foreign country or state could dissolve an English marriage such as the one then before the judges, that is to say, the marriage of two English persons domiciled in England who had not changed their domicile at the time when the aid of the Scotch Court was invoked to dissolve the marriage. Putting that construction upon the decision there is nothing to challenge remark, and yet although the language of the resolution is most carefully guarded it has been frequently assumed, and by Lord Brougham particularly, that the judges decided that an English marriage (whatever may be the true meaning of that term) could not be dissolved at all except in England. But the judges said nothing of the kind. They said merely that no foreign Court can dissolve an English

(1) Russ. & Ry. 237.

marriage for grounds on which it was not liable to be dissolved a vinculo matrimonii in England. The judges therefore who framed that sentence did not consider that it could be laid down as law that a marriage could not be dissolved in England at all. It would have been an idle form of words to use if they had not considered that the law of England provided means of obtaining divorce a vinculo matrimonii, although not by the ordinary tribunals, yet by the peculiar and exceptional proceeding before the House of Lords. And further their decision leaves open for consideration this most important question, whether an English marriage could not be dissolved by the decree of a foreign Court, provided it proceeded only upon such grounds as would have been recognised as sufficient for dissolving the marriage in England.

Much may be said in favour of our recognising in such circumstances the decree of the foreign Court. For assuming that we protect the interests of society in England against the dissolution of the marriage of English persons abroad for some cause for which it could not be dissolved here—there seems no reason why, by the comity of nations, we should not recognise the decree of a foreign Court which proceeded upon principles in accordance with the English law. Where the parties have not gone abroad for the purpose of defrauding the English law, but, being abroad, have sought only such a remedy as they might have obtained in England, why should not we recognise the sentence of the foreign Court? Many illustrations might be given of hardships from acting upon any other principle. These have been so strongly felt that in the American Courts it is now established that a wife can acquire a domicile apart from her husband for the purpose of instituting a suit against him for divorce. In such a case, if the substance is looked at and not the form, it does not matter whether it is said that a wife can acquire a separate domicile for that purpose, or that residence short of domicile under certain conditions shall entitle the wife to institute a suit for divorce. But it might equally be a hardship upon a husband that he should be obliged in all cases to go to the place of his domicile to seek a remedy for the wrong done to him abroad. His residence there might be under conditions which would make it practically impossible for him to come back to England. He

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might have married a woman in a foreign country, where though not the place of his domicile he might have his only means of subsistence. All the evidence of her guilt might be there, and to require him to come back to England for the purpose of seeking a remedy might be in effect to deny it to him altogether. Such a case is not now before the Court. I am merely calling attention to the fact that the qualification of the judges in *Lolley's Case* (1) points to this, that there may be some instances in which an English marriage may be dissolved by a foreign Court if the proceedings be upon a ground for which the vinculum might have been dissolved in England.

Lord Brougham, who was counsel in *Lolley's Case* (1), felt very strongly the hardship of the sentence passed upon his client, and most persons would now agree that it was unduly severe, because the man apparently had acted upon advice that had been given him. And, inasmuch as English persons could go across the border and contract a valid marriage which would have been invalid if contracted in England, he might very well not be able to perceive the distinction between that and going across the border to get a marriage dissolved, and yet Lolley was sentenced to seven years' transportation because he did not see that distinction. Lord Brougham, therefore, under the influence of his feelings, disparaged this case whenever he had the opportunity, and he also, as it would seem, misconceived it, for he constantly represented it as deciding something more than it did. For instance, in the case of *McCarthy* v. *De Caix* (2) he says, it is "fully established by the opinion of the twelve judges who solemnly decided it after argument that no proceeding in a foreign Court could operate to dissolve or affect a marriage celebrated in England." Instead of using the words the judges had used—"an English marriage"—he uses the expression, "a marriage celebrated in England," and he also leaves out the qualification and represents them to have decided that no proceeding whatsoever in a foreign Court could operate to dissolve a marriage contracted in England. He further says that Lord Eldon was under a misapprehension as to *Lolley's Case* (1): "I find," he says, "from the note of what fell from Lord Eldon on the present appeal, that his Lordship

(1) Russ. & Ry. 273. (2) 2 Russ. & My. 617.

laboured under considerable misapprehension as to the facts in *Lolley's Case* (1), he is represented as saying he will not admit that it is the settled law, and that therefore he will not decide whether the marriage was or not prematurely determined by the Danish divorce. His words are, that 'without other assistance I cannot take upon myself to do so.'" It is probable that Lord Eldon at that time, namely in 1831, was aware of what the real decision was in *Lolley's Case* (1), and that he had freed himself from the error he had been led into by Lord Brougham. For Lord Brougham states (at p. 620) that he had furnished Lord Eldon with a note of *Lolley's Case* (1) when the case of *Tovey* v. *Lindsay* (2) was being argued before the House of Lords. What that note was we see in 1 Dow's Reports, p. 127. It was in these words that the judges "were unanimously of opinion upon the points reserved that a marriage solemnized in England was indissoluble by anything except an Act of the legislature." I have shewn that this is incorrect.

In *McCarthy* v. *De Caix* (3) Lord Brougham took the opportunity of shewing that *Lolley's Case* (1) from his point of view was a reductio ad absurdum. But it appears from Lord St. Leonards' observations in the case of *Geils* v. *Geils* (4) that he was counsel in the case of *McCarthy* v. *De Caix* (3) for the successful representative of the husband. And he says (p. 262), "My recollection enables me to say that the question of the effect of the divorce was not argued in that case, but the Lord Chancellor took up the point, and upon the strength of *Lolley's Case* (1), he held that an English marriage could not be dissolved by a Danish Court, and that our law could not recognise a dissolution." I have not the pleadings in that case before me, but it is evident that the bill had been so framed that it did not raise this point which Lord Brougham took, for if it had necessarily raised the question it is inconceivable that Lord St. Leonards would not have taken it. But be that as it may, it amounts simply to this, that Lord Brougham upon a misconception of what the judges had decided in *Lolley's Case* (1), insisted that it was still law and that it led to these conclusions, which it was perfectly plain from what he said

(1) Russ. & Ry. 273.
(2) 1 Dow. 117, 131.
(3) 2 Russ. & My. 617.
(4) 1 Macq. H. L. 259.

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in *Warrender* v. *Warrender* (1) he thought absurd. What he really thought of *Lolley's Case* (2) as he understood it, and as it has been interpreted before me to-day, is clear from his observations in *Warrender* v. *Warrender*. (1) Lord Lyndhurst, while he condemned what he termed the dangerous and precipitate course of Lord Brougham in speaking of the decision in *Lolley's Case* (2), agreed with Lord Brougham that the Scotch Court had jurisdiction to dissolve a marriage which had been celebrated in England between a domiciled Scotchman and an English woman.

In the case of *Geils* v. *Geils* (3) Lord St. Leonards takes the point which I have already indicated to be the turning point in this case, for when dealing with the case of a domiciled Scotchman marrying an English woman in England (which is the case here) he says "The marriage is both an English and a Scotch marriage" (to which the reporter has added the scarcely necessary note, "English in point of celebration and Scotch in point of substance"). It appears from another report of this case (4) that the proceeding in the Scotch Court was for a cause for which the marriage could not have been dissolved in England, for it was by a wife for adultery alone. Adultery only was alleged in the pleadings, though in some proceedings in England she had accused him of cruelty also.

In *Conway* v. *Beasley* (5) this subject was brought before Dr. Lushington, than whom no one was more competent to form and express an opinion upon it. The decision there was that where a domiciled Englishman marries an English woman in England, if a decree of divorce be pronounced by a Scotch Court while the domicile of the parties remains English, it will not be recognised in an English Court as a dissolution of the marriage. This was in accordance with *Lolley's Case* (2) as I understand it. But Dr. Lushington expressly refused to treat *Lolley's Case* (2) as an authority for the proposition which has been contended for on behalf of the petitioner. He says (p. 643): "Cases have been cited in which it is alleged that a final decision has been pronounced by a very high authority upon the operation of a Scotch divorce upon

(1) 2 Cl. & F. 488.
(2) Russ. & Ry. 237.
(3) 1 Macq. 254, at p. 259.
(4) 20 L. T. (O.S.) 145.
(5) 3 Hagg. Eccl. 639.

an English marriage—that it has been determined that a marriage celebrated in England cannot be dissolved by the Scotch tribunal —that the contract remains for ever indissoluble. The authorities principally relied on for establishing that position are the decisions of the twelve judges in *Lolley's Case* (1), and the decision of the present Lord Chancellor on a very recent occasion. If these authorities sustained to its full extent the doctrine contended for, the Court would feel implicitly bound to adopt it; but I must consider whether in *Lolley's Case* (1) it was the intention of these very learned persons to decide a principle of universal operation absolutely and without reference to circumstances, or whether they must not, almost of necessity, be presumed to have confined themselves to the particular circumstances that were then under their consideration." He concludes (p. 653), "My judgment, however, must not be construed to go one step beyond the present case, nor in any manner to touch the case of a divorce a vinculo pronounced in Scotland between parties who, though married when domiciled in England, were at the time of such divorce bonâ fide domiciled in Scotland, still less between parties who were only on a casual visit in England at the time of their marriage, but were, both then and at the time of the divorce, bonâ fide domiciled in Scotland."

In *Maghee* v. *McAllister* (2) the question in this cause came before the Irish Lord Chancellor Blackburne. The only difference in the facts was that the wife was an Irish woman married to a domiciled Scotchman in England, but in my judgment the original domicile of the wife is irrelevant upon the ground I have already mentioned. *Maghee* v. *McAllister* (2) is therefore a direct decision on the question now before the Court. The Lord Chancellor, after considering all these cases, Lolley's amongst the rest, says, p. 607: "The case of *Munro* v. *Munro* (3) establishes that a marriage between a Scotchman and an English woman, though celebrated out of Scotland, is a Scotch marriage, so as to have the effect of legitimising children born before the marriage according to the rule of the Scotch law. The opinions of Lord Brougham and Lord Lyndhurst in *Warrender* v. *War-*

(1) Russ. & Ry. 273. (2) 3 Ir. Ch. Rep. 604.
(3) 7 Cl. & F. 842.

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render (1), of Lord St. Leonards in *Geils* v. *Geils* (2), of Dr. Lushington and Mr. Justice Storey, appear to be that a marriage such as this is a Scotch marriage;" and in giving his final judgment, he says (p. 609): "The first marriage was celebrated in England between an Irish woman and a Scotchman. He had not changed his domicile at the time of the marriage. He returned to Scotland with his wife, and she became a domiciled Scotch woman, and amenable to the jurisdiction of the Scotch Court. The case of *Warrender* v. *Warrender* (1) is expressly in point; and, acting on that case and *Munro* v. *Munro* (3), I am bound to hold the marriage to have been a Scotch marriage, notwithstanding *Lolley's Case.* (4) It was held in that case that a marriage celebrated in England, the parties being both English, could not be dissolved by the Scotch Courts. The parties in that case were not domiciled in Scotland, and had gone there merely for the purpose of getting rid of the marriage."

For the reasons I have given, and on the authorities I have referred to, I am of opinion that the resolution in *Lolley's Case* (4) is only applicable where the facts are similar, namely, where the parties, both at the time of the marriage and of the divorce, are domiciled English, and that it does not apply to a case where the parties are domiciled Scotch, or where the husband is a domiciled Scotchman, and during the continuance of that domicile his marriage is dissolved by the competent Court of jurisdiction in Scotland. In my judgment that is a good divorce everywhere, since it actually changes the status of the man, so that he may afterwards go to any other country in the condition of an unmarried man, free to contract another marriage. For these reasons my judgment must be in favour of the respondent.

Solicitor for petitioner: *S. A. Tucker.*
Solicitor for respondent: *J. S. Ward.*

(1) 2 Cl. & F. 488.
(2) 1 Macq. H. L. 259.
(3) 7 Cl. & F. 842.
(4) Russ. & Ry. 237.

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May 11.

Marriage—Divorce in America—Bigamy.

Two English persons married in England. The husband afterwards went to Kansas, in the United States, and, after an interval of a year, presented a petition and obtained a divorce by reason of his wife's desertion. He then married again. The wife had received no notice of the petition :—

Held, that his domicile at the time of the divorce was English; and that, therefore, the divorce was null and void, and he had committed bigamy.

Quære, whether the domicile of the wife is the domicile of the husband, so as to compel her to become subject to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicile.

THIS was a petition by Mrs. Sarah Priscilla Briggs for dissolution of marriage with her husband, the respondent, George Mills Briggs, on the ground of his adultery and desertion.

There was no appearance by the respondent.

April 4. *Searle*, for the petitioner.

The facts and arguments sufficiently appear in the judgment.

Cur. adv. vult.

May 11. THE PRESIDENT. The petitioner, Sarah Priscilla Briggs, seeks the dissolution of her marriage with the respondent, on the grounds of his desertion, bigamy, and adultery. The marriage took place at Birmingham in 1862. Both the parties were domiciled English subjects. In 1868 the respondent, being in difficulties, left this country to avoid his creditors, and went to the United States. After attempting to establish himself in business at Cleveland, in Ohio, he, as he himself says, at the sight of one of his creditors, fled 2000 miles farther west, and took up his residence in the state of Kansas, and there, on the 9th of June, 1873, procured a divorce from his wife on the ground of her desertion. On the 25th of September in the same year he went through a ceremony of marriage with Emma Helsby, with whom he has ever since cohabited.

It is not essential for the petitioner's purpose to establish the charge of desertion, as either the Kansas divorce is valid, in which case her marriage is already dissolved; or it is invalid, and she is

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entitled to succeed in this suit on the ground of her husband's bigamy and adultery. In this state of things a decree of this Court, whichever way it may be, will satisfy the object she has in view, by defining her position with regard to her husband, and enabling her, if so disposed, to contract a fresh marriage. It is only of importance, on public grounds, that the judgment of the Court should be based on principles which may be safely applied to future cases.

The first question which has to be considered is, whether or not the respondent, at the time of the institution of his suit for divorce had acquired a domicile in the state of Kansas. This is undoubtedly a question of difficulty on which opinions may differ.

In the first place, it is clear that the respondent did not voluntarily seek a new home. He left this country through fear of his creditors. The letters to his wife, which have been produced, shew that he had not, down to the summer before he commenced proceedings for divorce, abandoned the idea of returning here if, as he hoped, he could pay his debts. Writing in June, 1872, he says: "How dare I return to England unless I could pay my creditors;" and he adds that if he had a sum of money he had left with his wife, and which he requests her to bring to him, he "could soon be a rich man, and could return to England and enjoy his and her declining years in peace and plenty;" and in a later letter he says his real design was to have returned, feeling certain he could make money in America. "If I had not had a strong head and strong mind, my heart would have broken, or I should have gone mad at the prospect, as I now see it, of being probably compelled to end my days here;" and in another letter he says, "I am building up all my hopes on being able to return to England in four or five years, and cannot do so except by practising the most strict economy," and other statements to the same effect occur in his letters. These passages seem strongly to indicate an "animus revertendi."

The onus of proving an intention to abandon the domicile of origin lies on those who assert it. In the present case though the respondent has not entered an appearance to the petition, he has given evidence under a commission issued at the instance of his wife, and he does not allege that he had acquired a Kansas

domicile, he merely swears that he had been resident in Kansas twelve months before March, 1873, when he filed his petition for divorce, and it appears from the proceedings and from the evidence of an expert that this is all that is required by the law of Kansas to give the courts of that state jurisdiction. It is of course possible that after writing the letters I have quoted, and before March, 1873, he had formed the fixed intention of remaining in Kansas, but as I have said it lies on him to prove this, and he has not attempted to do so. In these circumstances it appears to me that it is not established, that at the time of commencing proceedings for divorce he had freed himself from the restrictions of the English law by abandoning his English domicile and acquiring a domicile in Kansas.

If this be a correct view of the facts the law applicable to the subject is abundantly clear. This was an English marriage within the meaning of *Lolley's Case* (1), and it is governed by the resolution of the judges, that "no sentence or act of any foreign country can dissolve an English marriage a vinculo matrimonii, for grounds on which it was not liable to be dissolved a vinculo matrimonii in England." Here the marriage was dissolved on the sole ground of the desertion of the wife, for which it could not have been dissolved in England. It follows that in the courts of this country, whatever may be the case in Kansas, it must be regarded as a subsisting marriage, and the connection which has since been formed by the respondent by marriage with another woman must be treated here as bigamous and adulterous.

This view of the facts renders it unnecessary for me to determine whether I ought to act upon the doubt expressed by Lord Westbury in *Pitt* v. *Pitt* (2), viz., "whether the domicile of the husband is to be regarded in law as the domicile of the wife, either by construction or by attraction, so as to compel the wife to become subject for the purposes of divorce to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicile," a doubt, however, which Lord Kingsdown stated he did not share.

I am also relieved from the necessity of considering the effect of the wife, as she alleges, not having received notice of the

(1) Russ. & Ry. 237, at p. 239. (2) 4 Macq. 640.

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proceedings in the Kansas Court, the lax practice of that Court having been satisfied by the oath of the husband that he had posted to his wife in England a notice of his petition, and by publication of the notice in a Kansas newspaper during three weeks.

This practice of the Kansas Court certainly illustrates in a remarkable manner the injustice which Lord Westbury points out may be done to a wife by allowing the husband to choose his own forum; Lord Kingsdown's opinion, on the other hand, seems in accordance with the conclusions of foreign, and especially American, jurists on this subject.

For the reasons I have stated I pronounce a decree nisi, on the ground of bigamy coupled with adultery, and condemn the respondent in costs.

Solicitors for petitioner: *Letts Brothers.*

April 13.

THE SAVERNAKE. (1876 O. 275.)

Collision—Practice—Both Ships to blame—Costs of Reference.

7 P.D. 202

An action of damage was brought by the owners of the ship *V.* against the ship *S.*, and the owners of the *S.* claimed damages by way of counter-claim against the *V.* At the hearing of the action the Court found both ships to blame for the collision, condemned the owners of each ship in a moiety of the damage sustained by the other, referred the question of damages to the registrar and merchants and made no order as to costs. Afterwards the owners of the *S.* brought their counter-claim into the registry. No tender was made by the owners of the *V.*, and the registrar struck off less than one-ninth of the amount claimed, but made no recommendation as to the costs of the reference:—

The Court, on the application of the owners of the *S.*, condemned the owners of the *V.* in the costs of and incident to the reference.

THIS was an action of damage instituted on behalf the owners of the steamship *Vesuvius* against the steamship *Savernake.* The owners of the *Savernake* defended the suit, and claimed damages by way of counter-claim against the owners of the *Vesuvius*, and on the 24th of July, 1876, the Court pronounced that both vessels were to blame for the collision in respect of which the action was brought; condemned the owners of each in a moiety of the losses and damages sustained by the other, referred the question of

damages to the registrar and merchants and made no order as to costs.

In November, 1876, the owners of the *Savernake* commenced an action in the Chancery Division for the purpose of having their liability for the damage to the *Vesuvius*, and her cargo, in consequence of the collision, limited under the Merchant Shipping Act, 1862, s. 54, and on the 29th of December, 1877, they paid into court in that action 5212*l.* 3*s.* 5*d.*, being 8*l.* per ton on the tonnage of the *Savernake*, together with interest.

On the 8th of May, 1877, the judge of the Court of Admiralty stayed all proceedings in the action in the Admiralty Division, pending the decision of the action for limitation of liability in the Chancery Division.

On the 25th of June, 1877, judgment was given in the limitation of liability action in the Chancery Division, when a declaration limiting the liability of the owners of the *Savernake*, as claimed by them, was made, and inquiries were directed for the purpose of distributing the amount paid into court amongst those persons who should be found entitled.

By an order of the Master of the Rolls made in the limitation of liability action on the 19th of July, 1877, it was declared, inter alia, that the owners of the *Vesuvius* were entitled to prove for the moiety of the loss and damages sustained by them less a moiety of the loss and damage sustained by the owners of the *Savernake*, and that the inquiries, directed for the purpose of the distribution of the amount paid into court, should stand over till the loss and damages in respect of which the owners of the *Savernake* were liable had been assessed in the Admiralty Division.

So much of the last mentioned order, as declared that the owners of the *Vesuvius* were entitled to prove for the moiety of the loss and damage sustained by them, less a moiety of the damage sustained by the owners of the *Savernake*, was reversed by the Court of Appeal on the 22nd of March, 1879, and that Court declared that the owners of the *Vesuvius* were entitled to prove against the fund in court for the amount of one moiety of the loss or damage sustained by their vessel in the collision, and that the amount for which they were so entitled to prove should be ascertained in the Admiralty registry, as directed by the

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order of the Judge of the Admiralty Court made on the 24th of July, 1876. (1)

On the 22nd of July, 1879, the owners of the *Savernake* brought in their counter-claim amounting to 957*l.* 6*s.* into the Admiralty registry. No tender was made by the owners of the *Vesuvius*, and on the 10th of November, 1879, the registrar reported that there was due to the owners of the *Savernake* for their moiety of the damages, pronounced for by the order of the Judge of the Court of Admiralty on the 24th of July, 1876, the sum of 848*l.* 13*s.* together with interest, but made no recommendation as to how the costs of the reference should be borne.

April 13. *Myburgh*, on behalf of the defendants the owners of the *Savernake*, moved the judge in court to condemn the owners of the *Vesuvius* in the costs of and incident to the reference. The Court has a discretion as to how the costs of the reference are to be borne, and it is now settled law that that discretion must be exercised without any reference to the nature of the judgment pronounced at the hearing of the action, and solely according to the result of the litigation before the registrar: *The Consett.* (2) In the present case the counter-claim brought in by the owners of the *Savernake* was not an exorbitant one, and no tender was made by the owners of the *Vesuvius* before the registrar. The discretion of the Court ought therefore to be exercised in favour of the owners of the *Savernake*, and the costs they ask for given to them.

E. C. Clarkson, for the plaintiffs the owners of the *Vesuvius*, contrà.

SIR ROBERT PHILLIMORE. In this case I must follow the decision of the Court of Appeal in the case of *The Consett.* (2) The application will therefore be granted and with costs.

Solicitors for owners of the *Vesuvius*: *Pritchard & Sons.*

Solicitors for owners of the *Savernake*: *T. Cooper & Co.*

(1) See *Chapman* v. *The Royal Netherlands Steam Navigation Co.* 4 P. D. 157. It did not appear at the hearing of the motion that at that time any proceedings had been instituted in the Admiralty Registry to ascertain the amount of damage sustained by the *Vesuvius*.

(2) 5 P. D. 77.

THE TALCA. (1880 R. 32.) 1880
Feb. 19.

Restraint—Bail for safe Return—Jurisdiction.

The Court has jurisdiction to arrest a vessel in an action of restraint at the suit of a part owner holding a minority of shares, notwithstanding that the vessel is about to proceed on a voyage approved of by a majority of the part owners, and is being employed under a charter entered into by the ship's husband, appointed to act on behalf of all the owners.

THIS was an action of restraint instituted on behalf of John Nicholas Richardson, the owner of eight sixty-fourth shares in the vessel *Talca*, against that vessel. The writ was indorsed as follows: "The plaintiff, as owner of eight sixty-fourth shares in the vessel *Talca*, being dissatisfied with the management of the said vessel, claims that the owners shall give him a bond in 625*l.* for the value of the plaintiff's said shares in the said vessel." On the 11th of February in this year a warrant to arrest the *Talca* was applied for in the registry, and an affidavit to lead warrant made by the plaintiff was brought in. From such affidavit it appeared that the plaintiff was the owner of eight sixty-fourth shares in the ship; that on the 16th day of January, 1880, he attended a meeting of the owners of the vessel, when it was resolved by a majority of the owners to send the vessel to the west coast of South America, and he thereupon gave notice that he would not be liable in any way for the debts of the said intended voyage. Subsequently, on the said 16th day of January, he wrote Messrs. L. & G. Tullock, the managers of the vessel, the following letter:—

Swansea, January 16, 1880.

Confirming the verbal notice I gave at the meeting of owners to-day, I shall decline for the reasons stated to participate in any way with the projected voyage, or with any outlay in respect thereof, or with any outlay whatever upon the vessel on and from this date; and, further, I shall require approved security for her safe return, equal to the amount I have at stake in her, before she leaves this port.

On the 29th of January, not having received any reply, he wrote a further letter, which was as follows:—

I notice "*Talca*" is entered outwards for loading, please, therefore, to send me the required security, as per my letter of the 16th inst., to save unpleasant

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results. If I do not hear from you by return, I shall consult a solicitor, and you will unnecessarily involve my co-owners in law costs.

An appearance was entered for the remaining owners of the *Talca*, and their solicitors, on the 17th of February, gave notice that the judge in court would be moved on behalf of the defendants to order the release of the *Talca* and to condemn the plaintiff in the costs of the release.

In support of the motion an affidavit was filed, in which one of the members of the firm of Messrs. L. & G. Tullock deposed in substance as follows:—

On or about the 10th day of February, 1879, my firm were appointed managers of the said barque, and from that time to the present time I have acted as the manager of the said barque under the appointment aforesaid.

In the month of November last, at a time when the said vessel was about due in London on a voyage from the United States, I, as such manager as aforesaid, procured a freight for the said vessel for a voyage to Valparaiso and back at 22*s.* 6*d.* per ton on the outward passage, and 50*s.* or 55*s.*, according as the ship should discharge in the United Kingdom or on the Continent, for the homeward passage. The charterers of the said ship for the said voyage to Valparaiso and back are Messrs. Duncan, Fox, & Co., of Liverpool, and formal charterparties were made and signed by them and me for the same voyage on or about the 28th day of the said month of November.

The ship commenced loading the cargo of coal at Swansea, to be taken out to Valparaiso under the outward of the said two charterparties, on or about the 31st day of January last, and on the 11th day of February instant she finished loading the said cargo.

On the same day that the said ship finished loading the said cargo, she was arrested in this action.

I have no interest in the said ship except as manager, and my right to the management of her has not been disputed during the twelve months that I have had the management, either by the above-named plaintiff or by any other owner.

The said plaintiff gave me no warning that I was not to charter the said vessel for the voyage in question, or for any other voyage; and I bonâ fide entered into the said charterparties as the agent or representative of the owners of the said ship generally.

E. C. Clarkson, for the defendants, in support of the motion. In the circumstances of this case the defendants are entitled to have the vessel released without bail. This is not the usual case of a part owner dissenting to the proposed employment of a vessel before any charterparty has been entered into. Here the charter complained of was made more than a month before the plaintiff expressed any dissatisfaction, and was signed by the ship's husband, who had been regularly appointed by the owners generally, and

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THE TALCA.

who in so signing acted as the agent of the plaintiff, as well as of the other part owners.

G. Bruce, for the plaintiff. The right of a part owner holding a minority of shares in a vessel to institute an action of restraint and arrest the vessel is undoubted, and the Court is bound, on sufficient proof being adduced that the plaintiff objects to the manner in which the vessel is being employed, to order that security for the safe return of the vessel be given by the remaining part owners in the amount of the plaintiff's interest in the vessel: *The Apollo.* (1) This is no hardship on the defendants, for if the Court makes the order for security, the plaintiff, though not liable for the expenses of the voyage on which the vessel is engaged, will not be entitled to any share of the profits of the adventure. As soon as the plaintiff knew of the intended employment of the vessel he objected. He cannot be prejudiced by what was done without his knowledge. All the facts of the case are before the Court on affidavit, and the plaintiff asks, not only that the motion should be dismissed with costs, but also that the present should be treated as the hearing of the action, and that the Court should order that the defendants should give the security for safe return claimed by the writ.

Clarkson, in reply.

SIR ROBERT PHILLIMORE. I am of opinion that on principle a release of the vessel can only be granted on bail being put in to the amount of the plaintiff's shares. I do not think that the right of the plaintiff to arrest the vessel is in any way affected by the fact that the ship's husband, who negotiated the charterparty to which the plaintiff objects, was appointed by the whole body of the co-owners without objection on the part of the plaintiff. The motion must be dismissed with costs.

As all the facts of the case are before me, and as the plaintiff's counsel has applied for an order that the defendants give security for the safe return of the vessel, I shall make that order now in order to prevent further delay and expense.

Solicitor for plaintiff: *J. Davies.*

Solicitors for defendants: *Pritchard & Sons.*

(1) 1 Hagg. 306.

1880
April 13.

THE RADNORSHIRE. (1880 C. 35.)

Damage—Practice—Interrogatories—Rules of the Supreme Court, November, 1878, rule 3 (*Order XXXI., rule* 5).

Interrogatories administered in a collision action, and relating to the circumstances of the collision, will not be struck out under rule 3 of the Rules of the Supreme Court of November, 1878, as scandalous or unreasonably or vexatiously exhibited, because the information sought to be obtained through them would for the most part be afforded by the preliminary acts.

THIS was a motion on behalf of the plaintiffs in an action of damage, instituted on behalf of the owners of the vessel *Paria* against the ship *Radnorshire,* to strike out interrogatories administered to the plaintiffs by the defendants. The whole of the interrogatories related to the circumstances of the collision, and the first thirteen of them sought information which would to a great extent be afforded by the plaintiff's preliminary act. The 14th interrogatory was in substance as follows:—

14. Is there any act, command, fact, matter, or thing not disclosed in your answers to the above interrogatories which it is material to the defendants to know for the purpose of defeating your claim in this action, or for the purpose of rendering you liable for all or some of the damage resulting from the collision mentioned in the statement of claim? If yea, set it forth. State when it happened, and who can depose to the same.

E. C. Clarkson, on behalf of the plaintiffs, in support of the motion. It is contrary to the practice of this Court to allow interrogatories to be administered in a collision suit when the information sought to be afforded by their means is substantially the same as will be disclosed in the preliminary acts: *The Biola.* (1)

Milward, Q.C., and *Hilbery,* for the defendants, opposed the motion. The interrogatories in this case are not unreasonably or vexatiously exhibited, nor is any particular interrogatory scandalous; consequently the Court has no power to set them aside or strike them out under rule 3 of the Rules of the Supreme Court, November, 1878.

SIR ROBERT PHILLIMORE. I do not think that I can grant this application so far as it relates to the first thirteen interroga-

(1) 24 W. R. 524; Weekly Notes (1876), p. 63.

tories. They have not been exhibited unreasonably or vexatiously, and they certainly cannot be considered scandalous. With regard to the 14th interrogatory, I think it is too vague and ought to be struck out.

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THE RADNORSHIRE.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *F. W. & H. Hilbery.*

THE FANCHON. (1880 S. 067.)

April 21.

Mortgage—Mortgagor's right to charter Ship.

Where a beneficial charterparty has been entered into by a mortgagor in possession of a ship the mortgagee cannot object to the charterparty being carried out simply upon the ground that the effect of carrying out the charterparty will be to remove the ship out of the jurisdiction of the Court, and to render it difficult for him to enforce his mortgage security.

THIS was an action of mortgage instituted on behalf of one of the members of the firm of Messrs. Smith, Payne, & Smith, bankers, of London, the transferee of a mortgage on twenty sixty-fourth shares of the British colonial vessel *Fanchon*, against that vessel. On the 7th of April, when the vessel was arrested, she was under charter to Messrs. Hagan & Co., ship-brokers, of London, and a member of that firm entered an appearance as an intervener in the suit and gave notice that the Court would be moved on his behalf to release the vessel immediately, and condemn the plaintiff in costs.

The motion was grounded on an affidavit made by the intervener and by a member of the firm of ship-brokers who had effected the charter as agents for the ship-owners. This affidavit contained, inter alia, the following allegations:—

On the 19th day of March the *Fanchon* arrived at Queenstown on a voyage from Boston in the United States with a cargo of grain, and was ordered to Hull, where she arrived on the 25th of March. The agents of her owners had been instructed after the arrival of the vessel at Queenstown to find outward employment for her, and on the 31st of March they chartered her to Messrs. Hagan & Co. to carry a cargo of cliff stone from Hull to Philadelphia. It is difficult to procure charters from Hull to the ports of the United States, and many ships sail from Hull to those ports in ballast, and the charter under which the *Fanchon* was so chartered was the most advantageous which could be procured for the

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vessel, which could in no way be damaged or deteriorated by performing it. The plaintiff's mortgage became due on the 6th of April, and on the same day the plaintiff sent a ship-keeper on board her. The discharge of the inward cargo of the *Fanchon* was completed about the 9th of April, whilst the vessel was under arrest, and the loading of the outward cargo under the charter in question commenced about the 10th of April, and she would be fully loaded and ready to proceed on her outward voyage on the 19th of April. Neither the agents for the ship nor the charterers had any previous knowledge that the plaintiff intended to arrest the vessel.

A copy of the charterparty was annexed as an exhibit to the above-mentioned affidavit. The charter contained the ordinary stipulations, and provided that the *Fanchon* should load in the customary manner at Hull about 700 or 800 tons, at captain's option, of cliff stone, and proceed to Philadelphia alongside such pier or wharf where she could lie afloat as ordered and deliver the same on being paid freight at the rate of 12*s.* sterling per ton invoice freight in full of all port charges and pilotage as customary.

It was stated in another affidavit filed in support of the motion that there was little doubt that if the ship was detained under arrest till the mortgaged shares were sold the buyers of the cliff stone at Philadelphia would reject it on its arrival there.

An affidavit, in which the manager of Messrs. Smith, Payne, & Co. deposed, inter alia, as follows, was filed in opposition to the motion.

The mortgage proceeded on in the action was duly transferred for value to the plaintiff on behalf of Messrs. Smith, Payne, & Smith, but the amount thereby secured was not due until the 6th day of April, 1880, and the plaintiff was therefore not entitled to take possession of the vessel under the said mortgage until that day. Upon that day the plaintiff duly took possession by his authorized agent, and he was in possession when the proceedings in this Court to enforce the said mortgage were commenced, and when the vessel was arrested.

The *Fanchon* is a vessel belonging to Yarmouth, Nova Scotia, and no owner or part owner of the said vessel is resident within the jurisdiction of the Court, and having reference to the circumstances hereinafter mentioned, I am informed and believe that should the vessel be allowed to leave this country before the plaintiff's mortgage is satisfied the plaintiff's security will be in peril, and it will be extremely doubtful and uncertain when he will have an opportunity of enforcing his claim. The plaintiff's claim on the said security amounts to upwards of 1000*l.*

As regards the charter referred to in the affidavits in support of the motion, I am informed and believe that it is not a charter for any profitable employment of the ship, but a mere charter for ballast for the purpose of taking the vessel back

to America out of the jurisdiction of this Court with as little loss as possible, and I am informed and believe that the freight payable under such charter is not a profitable or proper freight except for that purpose, and that the said freight will barely pay the expenses of the voyage back to America.

A further affidavit in opposition was brought in, in which it was stated that notice that the plaintiff intended to take possession of the *Fanchon* was served on one of the officers in charge of the *Fanchon* on the 3rd of April, 1880; that the broker of the *Fanchon* was informed on the 8th of April that the persons shipping the outward cargo of cliff stone on board the *Fanchon* would do so at their own risk; and that it was believed that during the negotiations between the agents for the ship and the agents for the charterers, the latter had been informed that the plaintiffs were about to take possession of the *Fanchon*.

An affidavit filed in reply on behalf of the intervener, stated that if the *Fanchon* had proceeded in ballast to the United States she would have made a loss of 50*l*., whilst under the charter she would earn 480*l*.

April 21. The motion was now heard.

E. C. Clarkson, and *J. P. Aspinall*, for the intervener. There is no proof that by the performance of the charterparty in this case the security of the mortgage will be in any way depreciated or diminished. On the contrary, the result of the evidence is that the charterparty is the most beneficial charterparty that could in the circumstances be procured. Consequently the charterers are entitled to have the vessel released, for it is settled law that unless it can be proved that the engagements of the mortgagors as to the employment of the ship entered into whilst the mortgagee is out of possession would impair the mortgage security, the mortgagee is bound by them to the same extent as the mortgagor: *Collins* v. *Lamport* (1); *Johnson* v. *Royal Mail Co.* (2); *The Innisfallen*. (3)

Moreover, in this case the agent of the owner had no notice when he effected the charter that the mortgagee intended to take possession of the ship, and have her placed under arrest.

(1) 34 L. J. (Ch.) 196. (2) Law Rep. 3 C. P. 38.
(3) Law Rep. 1 A. & E. 72.

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[They also referred to the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 70.]

Butt, Q.C., and *W. G. F. Phillimore*, for the plaintiffs. In considering what engagements of a mortgagor are binding on his mortgagee, it cannot be that the sole question to be decided is whether the charter if carried out will leave a margin of profit. There must be a further question whether the charterparty was entered into bonâ fide or for the purpose of prejudicing the rights of the mortgagee. The circumstances in which the charter in this case was effected are suspicious. The loading of the outward cargo began during the time the vessel was under arrest, and after the day when it must have been known that the mortgage money was due, whilst it certainly cannot be contended that the charter is a very profitable one. It must, moreover, be remembered that the vessel belongs to a colonial port, and that if the arrest is taken off and she is allowed to leave the jurisdiction, not only will the legal right of the plaintiff to enforce his mortgage by a suit in rem be interfered with, but he will probably be put to much greater expense in realising his security than if the mortgaged shares were sold whilst the arrest continued.

Clarkson, in reply.

SIR ROBERT PHILLIMORE. This case is not without difficulty, and after some consideration I have arrived at the following conclusion. The case relied upon as containing the law upon the subject is that of *Collins* v. *Lamport* (1), in which judgment was delivered by Lord Chancellor Westbury in 1865, and the passage which has been referred to more than once in the argument, and which I must mention again is this:—

> As long therefore as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as those dealings do not materially prejudice and detract from or impair the sufficiency of the security comprised in the mortgage, so long is there parliamentary authority given to the mortgagor to act in all respects as owner of the vessel, and if he has authority to act as owner he has of necessity authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and benefit of his property.

Therefore the proposition of law governing the case is that the

(1) 34 L. J. (Ch.) 196.

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mortgagor has full power to deal with the ship, provided he does not materially impair the value of the mortgagee's security. I take it that it lies on the mortgagee to satisfy the Court that this charterparty would materially prejudice his security; and I am not satisfied on reviewing the evidence that he has discharged this burden of proof. I think that he has failed to shew that the carrying the charterparty into effect would impair his security. It is a case in which the principle laid down in *Collins* v. *Lamport* (1) applies, and I must order the release of the vessel. I do not think it is a case for costs.

Solicitors for plaintiffs: *Waltons, Bubb, & Waltons.*
Solicitors for intervener: *T. Cooper & Co.*

THE SILESIA. (1880 V. 019.)

June 29.

Salvage—Agreement set aside as inequitable—Costs.

Where, in the opinion of the Court, a salvage agreement is exorbitant, the Court will refuse to enforce it.

In a case where the master of a disabled ship at sea about 340 miles from Queenstown, requested assistance from a mail steamer, and agreed in writing to make his owners responsible to the extent of 15,000*l.*, provided the master of the mail steamer would tow the disabled ship to Queenstown, and the service was performed, the Court declined to enforce the agreement, and awarded to the salvors by way of salvage reward 7000*l.*, in addition to a sum sufficient to cover penalties which had become payable by the owners of the mail steamer by reason of the vessel deviating to perform the service.

THIS was an action of salvage instituted on behalf of the owners, master, and crew of the steamship *Vaderland* against the steamship *Silesia* her cargo and freight.

The statement of claim alleged in substance as follows:—

1. The *Vaderland* is a screw steamship of 2748 tons register, fitted with engines of 300 horse power, working up to 1800 horse power, and at the time of the services hereinafter stated was on a voyage from Antwerp to Philadelphia laden with a general cargo, and carrying mails and 274 passengers. She was carrying the mails under a subsidy from the Belgian government, and was under heavy penalties both for delay and deviation. She was manned by a crew of seventy-six hands, including H. E. Nickels her master; and was of the value of 50,000*l.* Her cargo was worth 20,000*l.*, and the freight and passage-money she was earning amounted to 2700*l.*

(1) 34 L. J. (Ch.) 196.

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2. At about 8 o'clock on the morning of the 26th of March, 1880, the *Vaderland* was in the North Atlantic Ocean in about latitude 49° 34′ N. and longitude 15° 38′ W., and was proceeding on her said voyage when those on board her sighted a large steamship flying signals of distress. The course of the *Vaderland* was immediately altered, and she bore down towards such vessel.

3. The wind at such time was fresh from the eastward, and there was a heavy westerly swell.

4. The *Vaderland* reached the distressed vessel, which proved to be the screw steamship *Silesia* in a disabled condition, rolling dangerously in the trough of the sea, and the *Vaderland* steamed as close as possible to the *Silesia*, and her engines were stopped. It was then about 10 A.M.

5. Shortly afterwards C. Ludwig, the master of the *Silesia*, came on board the *Vaderland*, and stated as the facts were that the *Silesia* was on a voyage from New York to Hamburg laden with a general cargo and specie, and carrying passengers and mails, and that her main shaft had broken five days previously, and that she was quite disabled and required assistance and to be towed to Queenstown.

6. The master of the *Vaderland*, considering the number of persons on board the *Silesia*, and the danger to which they and the *Silesia* and her cargo were exposed, and notwithstanding the heavy responsibility he would incur by deviating from his voyage with the *Vaderland*, which was one of a regular line of steamers carrying as aforesaid the mails and passengers, agreed with the master of the *Silesia* to tow the latter to Queenstown, but only upon the terms that 15,000*l.* should be paid for the service. To these terms the master of the *Silesia* agreed, and they were reduced into writing and signed by the masters of the *Silesia* and the *Vaderland* respectively.

7. All hands on board the *Vaderland* were thereupon engaged in making preparations for towing the *Silesia*, and a wire tow-rope from the *Silesia* was hauled on board the *Vaderland*, and there made fast.

8. The *Vaderland* then commenced to tow the *Silesia*, but at about 12.45 P.M. the tow-rope parted.

[In the 9th, 10th, 11th, 12th, and 13th paragraphs the operations attending the towage service were detailed.]

14. The various operations stated in the last seven paragraphs were performed with difficulty, and were attended with danger to the *Vaderland* and those on board her, as there was still a heavy swell and danger of fouling and collision was experienced. Those of the crew of the *Vaderland* who tended the hawsers incurred considerable risk of personal injury from breaking of hawsers.

15. During the 28th fog prevailed. At about 6 P.M. on that day the ships were off Galley Head, on the coast of Ireland. At 10 P.M. a pilot was taken on board the *Vaderland*, and the *Vaderland* continued to steam towards Queenstown, but very slowly until daylight reappeared. The lead was kept constantly in use.

16. At 6.10 A.M. on the 29th of March the fog lifted and Daunt's Rock Lightship was seen ahead and speed was increased. At 7.20 A.M. the fog being very dense the hawsers were slipped, and the two vessels were brought safely to anchor in ten fathoms of water.

17. The *Vaderland* steamed up the harbour of Queenstown, and the *Silesia* was towed up by some steam-tugs.

18. The *Vaderland* then took on board a fresh supply of coal, and resumed her voyage.

19. By the said services the *Silesia* and her cargo and specie and those on board her were saved from a position of great danger.

21. The *Vaderland* in rendering the said services had tow-ropes damaged entailing a loss to her owners of upwards of 60*l*. She also consumed about 245 tons of coal extra, of the value of 225*l*., and incurred other expenses.(1) She

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(1) The following are particulars of the expenses referred to in this paragraph, delivered pursuant to order:

	£	s.	d.	£	s.	d.
Insurance on steamship *Vaderland* during time occupied in rendering the salvage services				50	0	0
Wages paid to the master, officers, and crew of the *Vaderland* during same time				90	0	0
Provisions for crew and passengers of the *Vaderland* during same time				132	0	0
Extra coals consumed during same time				225	0	0
61 gallons oil consumed during same time				12	4	0
Damage done to the *Vaderland's* hawsers				60	0	0
Port charges in Queenstown—						
Telegrams	3	9	9			
Boat coming to Roches' Point	2	0	0			
Pilotage from sea	8	12	6			
Harbour dues	4	3	7			
Cost of arresting *Silesia*	5	3	8			
Miller, Ship Chandler	16	5	2			
Boat hire of officers	0	6	0			
Pilotage to sea	4	10	0			
Agency and commission	5	13	9			
Master's expenses	4	0	0			
				54	4	5
Expenses in Queenstown—						
Telegrams respecting *Silesia*	0	3	6			
Interpreter	0	5	0			
Messrs. Allen costs in Admiralty Courts	25	7	2			
Sundry cab hire	0	10	0			
Agency and commission	1	6	3			
				27	11	11
Penalties due to the Belgian Government for deviation and delay				1155	0	0
Estimated loss of *Vaderland's* earnings				1000	0	0
Estimated loss on charter of s.s. *Hevelius*				2000	0	0
				£4806	0	4

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deviated from her voyage and lost six days, and she incurred great risk of being damaged by collision with the *Silesia*, and of getting her propeller fouled by the tow-ropes and of so becoming disabled.

The plaintiffs claimed, 1, the sum of 15,000*l.* salvage pursuant to the said agreement. 2. In the alternative such an amount of salvage as the Court might think fit to award.

The statement of defence, after requiring the plaintiffs to prove their allegations as to the mail contract of the *Vaderland*, and the alleged penalties therein, and alleging in effect that the allegations in the statement of claim as to the weather, and the difficulty of the services rendered by the *Vaderland* were exaggerated, proceeded in the 3rd and 6th paragraphs substantially as follows:—

3. The agreement pleaded in paragraph 6 of the statement of claim was as the defendants submit an inequitable one, and was only signed by the master of the *Silesia* under compulsion, and because the master of the *Vaderland* threatened to leave the *Silesia* and proceed upon his voyage unless the said agreement was signed by the master of the *Silesia*. The master of the *Silesia* at the time when the said agreement was being discussed repeatedly stated that the sum demanded was in his opinion much too large, and proposed to the master of the *Vaderland* that the amount to be paid for the services to be rendered should be left to be settled between the owners of the two vessels.

6. Except that the *Vaderland* deviated from her voyage and lost four days, the defendants deny the several allegations in paragraphs 19 and 21 of the statement of claim. They deny that the plaintiffs have any claim under the agreement, but they submit to pay such an amount of salvage as the Court upon consideration of all the circumstances may deem just.

The values of the *Silesia* her cargo, passage-money, and freight were agreed as follows:—The *Silesia*, 49,000*l.*; her cargo, 56,000*l.*; specie, 958*l.*; passage-money and freight, 2640*l.*; in all, 108,598*l.*

June 23, 24. The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House. Witnesses were examined orally in Court on behalf of the plaintiffs and the defendants. The result of their evidence, so far as the same is material to this report, appears from the judgment. The agreement referred to in the 6th paragraph of the statement of claim was put in. The following is a copy of such agreement:—

"At Sea, 20th 3, 80, on board the Steamer *Vaderland*.

"We have this day made agreement as follows:—Captain Nickels engages to assist the *Silesia* with broken shaft and disabled, and

tow her to Queenstown to anchorage. For this service Captain Ludwig makes the company responsible for the above-mentioned service for the sum of 15,000*l.*

(Signed) "C. Ludwig.
(Signed) "H. E. Nickels.

"Witnesses to the above signatures.
(Signed) "T. Weberney, Chief Officer."

With respect to the item in the particulars relating to the *Hevelius*, evidence was given on behalf of the plaintiffs that in order to make up for the derangement of the service caused by the detention of the *Vaderland*, they had cancelled a charter-party under which the plaintiffs' steamship *Hevelius* was engaged, and had employed her in the mail service.

It was agreed between the plaintiffs and defendants that, in the event of the Court deciding against the salvage agreement set up by the plaintiffs, the owners of the *Silesia* would pay any sum not exceeding the sum of 1155*l.*, which the owners of the *Vaderland* might be forced to pay to the Belgian government in respect of the penalties referred to in the 1st paragraph of the statement of claim.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiffs. There is no authority for holding that salvage agreements will be set aside merely because the amount agreed to be paid is more than the Court itself would have awarded. Indeed, the true principle would seem to be that a salvage agreement will only be set aside where it is shewn that the master of the salved vessel has signed it under compulsion. In the recent case of *The Medina* (1), where a salvage agreement was signed by the master of a steamship employed in carrying pilgrims in the Red Sea, it was obvious on the evidence that if the master had refused to sign the agreement he would have taken upon himself the responsibility of allowing the pilgrims under his charge to be exposed to imminent peril of death.

In the present case the passengers on board the *Silesia* were in no danger of their lives, even in the unlikely case of the master of the *Vaderland* refusing on request to take them on board the

(1) 1 P. D. 272; 2 P. D. 5.

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Vaderland. In fact, the master of the *Silesia* was under no pressure whatever to accept the assistance of the *Vaderland*, but was merely in the same position as the master of every valuable vessel which is in want of salvage assistance. In these circumstances the Court will be loth to interfere with an agreement come to between two perfectly competent parties. If the Court should be of opinion that the agreement ought to be set aside, the plaintiffs, the owners of the *Vaderland*, are clearly entitled to be recompensed for the expenses occasioned to them by the necessity they were under of getting another ship to take the place of the *Vaderland*. The expenses they so claim to recover are in this instance what they estimate as their loss on the charter of their steamship *Helvelius*. In considering the amount of responsibility which the master of the *Vaderland* undertook when he entered into the agreement, it must not be forgotten that he was under instructions from his owners not to render salvage assistance to vessels not belonging to them, unless to save life.

Webster, Q.C., and *W. G. F. Phillimore*, for the defendants. The agreement cannot be supported. It is true that the lives of the crew and passengers of the *Silesia* were in no immediate danger, and so far the present case differs from that of *The Medina* (1), but it is idle to say that the master of the *Silesia* was under no compulsion to sign the agreement, it being in evidence that he was told that unless the agreement was entered into the *Vaderland* would go away and leave him. Moreover, the amount specified in the agreement is so grossly exorbitant in relation to the services rendered that the Court will, on that ground alone, refuse to assist in carrying it out: *The Helen & George.* (2) Whatever may have been the instructions given to the master of the *Vaderland* from his owner, the bills of lading and policies of that vessel are so framed as to admit of assistance being given to vessels in all situations.

Butt, in reply.

SIR ROBERT PHILLIMORE. This is a case of salvage service of very considerable merit, and upon that point there is no dispute whatever. The only question for this Court to decide is, whether,

(1) 1 P. D. 272; 2 P. D. 5. (2) Swa. 368.

having regard to all the principles on which salvage remuneration is awarded, the sum of 15,000*l.*, which was the sum agreed upon between the two masters, is so exorbitant as to induce the Court to set the salvage agreement in this case aside. The short history of the case is this: the *Vaderland*, a screw steamship of 2748 tons register, with engines of 300 horse power, working up to 1800 horse power, was on a voyage from Antwerp to Philadelphia laden with a general cargo, and carrying mails and 274 passengers. That there were these passengers on board is a most important element in this case. The mails were carried under a subsidy with the Belgian government, and the owners of the *Vaderland* were under penalties not to deviate or delay. The *Vaderland* had a crew of seventy-six hands, and her value, added to the value of her cargo and freight, was 72,000*l.* The vessel to which the salvage services in this case were rendered was the *Silesia*, and she had sixty-two passengers on board with a crew of ninety-five hands, and was 3150 tons gross register, and with her cargo and freight was of the value of about 108,000*l.* The *Silesia* was going from New York to Hamburg, and at the time when the accident happened she had got within 340 miles or thereabouts of Queenstown. On the morning of the 21st of March in this year the *Silesia* broke her propeller or screw shaft in the stern tube, and the consequence of that was that she became utterly inefficient so far as her steam power was concerned. The weather was fine and the sea was smooth, but after tossing about for four or five days, and when only about seven miles from the place at which the accident happened, she hoisted signals of distress, and on the 26th of March the *Vaderland* bore down upon her. What passed between the two masters it is better to state in their own words both having regard to the importance of the principles involved and the great value of the salved ship herself. The statement of Captain Nickels of the *Vaderland* is as follows:—

> Ludwig, the captain of the *Silesia*, asked me to tow him into a safe port. I said I could not do it, because I had instructions from my owners. Then he said, What am I to do, I cannot steer the ship? After a little while I said I will break my instructions for 20,000*l.* He said that was rather too much, and mentioned 12,000*l.* I said I would not run the risk for that money; then he made an offer for 15,000*l.*, and I said yes.

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Captain Ludwig's account is this:—

THE SILESIA.

Captain Nickels took me into his room, and I said I had been trying to sail for five days, but having the wind against me I could make no way. I thought I had better not try any longer, and I requested him to tow me. Nickels said he had instructions not to tow any ship as they had been taken in before, except for a certain sum of money, and then to give him a written agreement. I asked what he wanted. I said we had a case a couple of years ago and we had to pay 4000*l.* for it, and 5000*l.* would be about the money. He said, no, 20,000*l.* I said I was astonished, as it was an enormous sum, and they would never pay so much. I insisted on 5000*l.*, and he insisted on 15,000*l.* I thought it was a great sum, and he threatened to leave me unless I signed for 15,000*l.*

[His Lordship here read the agreement.]

The *Vaderland* took the *Silesia* in tow, and in about three days they accomplished 340 miles, and at the end of six days the *Vaderland* had again reached the vicinity of the spot where she had fallen in with the *Silesia*. That was the time she lost, and it was very strongly contended on her behalf that she had rendered herself liable to penalties under the mail contract by the deviation she had made from the course of her voyage. On this point I may observe that the question as to these penalties has been made the subject of an arrangement between the parties. Therefore so far this question is disposed of. The master of the *Silesia* referred in his evidence to instructions given him by his owners not to deviate from his voyage or delay the ship to render any assistance to vessels other than those belonging to his owners, except for saving life. On the other hand, the bills of lading and policies of insurance of the *Vaderland* provide for liberty to the ship to "assist all vessels in all situations." I do not think that the instructions to the master of the *Vaderland* can be pressed as affording any guide to the Court in ascertaining the amount of remuneration to be awarded for the services rendered.

There is a large sum mentioned as the estimated loss on the charter of the screw steamer *Helvelius*, which was employed in consequence of the derangement of the service in which the *Vaderland* was employed. The loss on this head I do not estimate at more than 500*l.*

The question the Court has to consider is whether the salvage agreement is an agreement which is so exorbitant that, in accord-

ance with decided cases and the principles on which they are founded, the Court ought to set it aside. And here I should say that in order to assist the Court in arriving at a conclusion upon this subject, it is necessary to consider, and I have considered carefully with the assistance of the Elder Brethren of the Trinity House, whether the owners of the *Silesia*, if present, would or would not have been justified in calling for the assistance of the *Vaderland* and in accepting the terms which the captain of the *Vaderland* asked. After the best consideration of this case, and considering the principles of other analogous cases, I have come to the conclusion, and the Elder Brethren agree with me, that the sum specified in the agreement is so exorbitant that the Court ought to exercise its equitable jurisdiction and not to assist in the carrying of it into effect. Looking to all the circumstances of the case, I have come to the conclusion that the proper sum to award in this case will be 7000*l.* to cover everything but the penalties. The question of costs must stand over for argument.

June 29. *E. C. Clarkson,* on behalf of the plaintiffs, moved the judge in court to condemn the defendants in the costs of the action. The general result of the action is in the plaintiffs' favour, and the Court in its discretion ought to give them the costs they ask for. If the defendants had not intended to dispute the right of the plaintiffs to a sufficient award of salvage they ought to have tendered the amount they considered the plaintiffs were entitled to. It is true that the plaintiffs have failed on one issue, but the extra costs of that issue are merely nominal. The same witnesses would have been called even if the agreement had not been set up.

W. G. F. Phillimore, for the defendants. The Court ought to make no order as to the costs of the action. This was the course pursued in the case of *The Medina* (1), where, as in this case, the defendants made no tender.

[He also referred to *The City of Manchester.* (2)]

SIR ROBERT PHILLIMORE. I think upon the principle on which this Court and the Court of Appeal acted in the case of

(1) 1 P. D. 272; 2 P. D. 5. (2) 5 P. D. 3.

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THE SILESIA.

The Medina (1), I must order that each party to the suit shall bear his own costs.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Lowless & Co.*

June 18.

THE CRAIGS. (1880 C. 063.)

Salvage—Derelict—Amount of Salvage Award—Apportionment.

A derelict vessel was found in the North Atlantic Ocean, 800 miles from land, in a seriously damaged condition, and was navigated into Queenstown by salvors, who incurred great risk and hardship in rendering the service. The value of the derelict was 5100*l.* The Court awarded 2300*l.* as salvage reward.

THIS was an action of salvage instituted on behalf of the owners, master, and crew of the screw steamship *Teutonia*, against the ship *Craigs*, her cargo and freight.

The paragraphs of the statement of claim describing the nature of the salvage services, the circumstances in which they were rendered, and the expenses incurred in rendering them were, so far as material, as follows:—

The *Teutonia* is a screw steamship of 2693 tons register, of which the plaintiffs were the owners, and at the time of rendering the services hereinafter mentioned, the *Teutonia* was bound on a voyage from New Orleans to Liverpool, laden with a general cargo and horses, and manned by a crew of fifty-two hands.

At about 4 A.M. on the 25th day of February, 1880, the *Teutonia*, in the prosecution of her said voyage, was in the North Atlantic Ocean, in about latitude 48° N., and longitude 27° W., and about 800 miles to the westward of Queenstown. The wind at the time was north-easterly, and there was a heavy swell running. In these circumstances a vessel was fallen in with apparently in distress or abandoned.

The *Teutonia* was stopped, and her chief officer and a boat's crew proceeded to, and with risk and difficulty succeeded in boarding, the vessel. She proved to be the ship the *Craigs* of Greenock, 1148 tons register, laden with a full cargo of pitch pine, and bound from Pensacola to Greenock. The *Craigs* had been abandoned by her crew, and was found to be in a disabled condition. She had lost her rudder. Her main yard was carried away in the slings, her two lower topsails were gone, and her upper fore and main topsails were split, and others of her sails were about the decks torn in pieces, the main hatch was broken, and the fresh water tank was found to be full of salt water, the bulwarks were

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(1) 1 P. D. 272; 2 P. D. 5.

smashed in on both sides, and the port pump was out of order, and it was estimated that there was about 4 ft. 6 in. of water in the hold.

The mate returned to the *Teutonia* and reported to the master the state of the *Craigs*, and the master determined to attempt to tow the *Craigs* to the nearest port. He accordingly sent some of the plaintiffs on board the *Craigs*, and at 6 A.M. the *Teutonia* steamed close to the *Craigs*, and, with considerable risk to the *Teutonia*, the steel hawser of the *Craigs* was passed to the *Teutonia*, and bent on to her ten-inch Manilla hawser, and made fast on board.

At about 7.30 A.M. the *Teutonia* commenced to tow the *Craigs*, but the *Craigs* having lost her rudder, sheered about a great deal, and after being towed for some time the hawser parted and carried away some of her head gear. The mate then returned to the *Teutonia*, and consulted with the master, and determined to attempt to sail the *Craigs* into port. Some stores and water, and a boat belonging to the *Teutonia*, were put on board the *Craigs*, and the plaintiffs McAdam, Graham, and Percival, able seamen, having volunteered to go with the mate, were put on board the *Craigs*, and at about 10.15 A.M. the *Teutonia* proceeded on her voyage, leaving the plaintiffs William Putt Couch, Lawrenson, Shiel, Hebe, Royal, Heidstrom, McAdam, Knowles, Pan, Mallon, Graham, and Percival on board the *Craigs*.

The salvors on board the *Craigs* proceeded to get the *Craigs* under command by getting up steam in the donkey engine to work the starboard pump, the port pump being out of gear, and then attempted to refix a temporary rope rudder which had been left by the crew of the *Craigs*, which however proved useless, whereupon the chief officer and the carpenter proceeded to construct a jury rudder of wood. About this time it was found that the *Craigs* had 7 ft. 6 in. of water in the hold instead of 4 ft. 6 in. All hands worked till dark, and the night watches were kept by two hands in a watch.

On the 26th of February the *Craigs*, still drifting to the northward and eastward, was in latitude about 48° 2′ N., and longitude 26° 34′ W., the salvors were employed securing the bowsprit and head gear, and in setting up and securing other gear, and in the construction of the jury rudder. Towards midnight it blew a fresh gale from N.W. with heavy squalls backing to S.W. On the 27th the wind was a fresh breeze from the N.W., and on the 28th the *Craigs* encountered strong variable winds with heavy squalls, the decks being filled with water, the ship being in an unmanageable condition. The jury rudder was completed, but owing to the heavy weather it could not be shipped, and in securing it to the deck the boatswain Shiel received a severe injury to his ankle. The donkey pump was kept going, and the crew constantly employed in attempting to get the ship under command.

On the morning of the 29th of February the donkey feed pump became choked with salt, and the pumping in consequence was stopped for four hours, and the ship made five inches of water per hour. A heavy gale was blowing from the W.S.W., with a high sea, and the *Craigs* was labouring heavily in the trough of the sea. The *Teutonia*'s boat was stove in, and the plaintiff Royal was washed off the house on deck, and severely injured.

On the 1st of March the gale increased to a hurricane from the W.S.W., and the water in the hold increased to eight feet, notwithstanding the donkey pump was constantly pumping. The gale continued during the 2nd, and the donkey

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boiler became salted, and caused the pump to be stopped for ten hours, during which time the water in the hold increased to fifteen feet. On the 3rd the gale continued and varied N.W. to S.W. The water in the hold was reduced to twelve feet, when the donkey engine broke down, and the crew turned to work the pump by hand, until in about five hours the donkey engine was repaired and at work again.

On the 4th of March the gale continued to blow from the south-westward, and the carpenter repaired the port pump, and it was started. On the 5th the gale continued, and the ship still drifted to the northward, and could not be got on to the other tack, and the crew became exhausted having been up day and night. On the 6th the fresh water was nearly finished, and a temporary condenser was fitted by the carpenter and donkey engine man.

On the 7th the heavy gale and high sea continued, and, whilst working at the rudder, the plaintiff McAdam was washed overboard by a sea, and was rescued with difficulty. The ship had by this time drifted into about latitude 51° 25′ N., and longitude 19° 11′ W. During the afternoon the gale moderated somewhat, and the ship was got on to the starboard tack. The gale increased again in the evening with a high cross sea, which caused the *Craigs* to labour heavily and ship a great deal of water, and the same weather was experienced during the 8th.

On the 9th the weather moderated, and the sea commenced to go down. The wooden jury rudder was got overboard, and, by means of gudgeon chains, was fixed in position against the sternpost, and by steering chains to the quarters, and the ship was got under steerage command by noon. The ship at this time was in about latitude 52° 19′ N., and longitude 17° 30′ W., and from the 10th to the 15th the *Craigs* experienced head-winds from the S.E. and moderate weather.

On the 16th, with a heavy breeze and a high sea, the wind shifted to the N.W., and took the ship aback, and the chain gudgeons of the rudder parted. Sheers were rigged, and the rudder hove up, and the gudgeons were repaired, and on the 17th the rudder was re-shipped and secured, notwithstanding the heavy sea and labouring of the ship. At about 3 P.M. a heavy sea struck the ship and carried away a steering gear bolt. At about 6 P.M., the ship heading E.N.E., and drifting to the north-eastward, an unsuccessful attempt was made to wear-ship.

On the 18th of March the wind was blowing a fresh gale from S.S.E. with a high sea, the ship labouring heavily, and making about four inches of water per hour. The ship was with great difficulty got round to the southward, being at the time in about latitude 52° 12′ N., and longitude 13° 52′ W. The provisions were found to be running short, in consequence of which the crew was put upon short allowance.

On the 20th a sudden shift of wind to N.W. caught the ship aback and displaced the rudder. The rudder was refixed, but about midnight the ship took a sudden sheer, and became unmanageable before the wind, and on the 21st, finding the ship still unmanageable, the rudder was hove up and enlarged, and was then refixed. At about noon the steamship *Iowa* was spoken, and provisions and other things were obtained.

On the 22nd the wind blew strongly from the S.E., and continued from that quarter during the 23rd and 24th, freshening to a gale. The plaintiff, William Putt Couch (the mate), was ill from the 21st to the 23rd. On the 25th a heavy

sea struck the rudder, and carried away the lower gudgeon, and started a steering gear bolt, but at daylight the rudder was hove up and repaired.

During the 26th, 27th, 28th, and 29th, the weather was moderate and the vessel was worked to the southward by wearing: the latitude on the 26th being about 51° 47′ N., the longitude 13° 49′ W.

At about 10 A.M. on the 30th, the south-west coast of Ireland was sighted. At 3 P.M. a pilot was obtained. During the night a strong W.S.W. gale was experienced, and the ship was hove to.

On the 31st, at daylight, the ship stood in for the land, and shortly afterwards the starboard steering chain was carried away by the sea, but a preventer chain was fitted. At noon a steam-tug was engaged for 15*l.* to tow the *Craigs* into Monkstown, and at 4 P.M. the *Craigs* was brought up by her anchors in Monkstown Reach in Queenstown Harbour.

By the said services the *Craigs* and her cargo were rescued from total loss.

In rendering these services the plaintiffs on board the *Craigs* incurred great hardships, and ran very great risk of losing their lives. The mate never had his clothes off except once for the purpose of changing them, and never had any regular rest. Shiel had his ankle crushed and severely injured, and Royal received a hurt in his side, and McAdam was nearly drowned as aforesaid. The said services were very skilfully rendered.

The master of the *Teutonia* in parting with his chief officer and boatswain and carpenter and nine men took upon himself great responsibility, and himself and the crew who remained on board the *Teutonia* incurred much extra labour by reason of her being short handed.

The owners of the *Teutonia* incurred great risk of loss or damage to the *Teutonia*, and of becoming liable to the owners of the cargo of the *Teutonia* by reason of her being left short handed, and by reason of the *Teutonia* taking the *Craigs* in tow the owners of the *Teutonia* suffered damage.

In rendering the said services the plaintiffs the owners of the *Teutonia* have incurred the following losses and expenses, viz.,—for provisions 8*l.* 3*s.* 4*d.*, for the small boat of the *Teutonia* 20*l.*, for stores supplied as aforesaid by the *Iowa* 21*l.* 5*s.* 1*d.*, and for expenses at Queenstown, including towage, pilotage, and provisions, 52*l.*

The defendants, the owners of the *Craigs*, her cargo, and freight, paid into court and tendered to the plaintiffs the sum of 1800*l.* This tender was rejected, and the defendants delivered a statement of defence, admitting in substance that the plaintiffs had rendered the services in the statement of claim mentioned.

June 18. The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House. No witnesses were called, either on behalf of the plaintiffs or the defendants. It was agreed that the value of the property salved should, for the purposes of the case, be taken as 5100*l.*

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Butt, Q.C., and *E. C. Clarkson*, appeared for the plaintiffs. The services in this case are so meritorious that the Court ought to award to the salvors a moiety of the value of the property salved, and in addition direct that the expenses incurred in rendering the services should be paid: *The Rasche.* (1)

W. G. F. Phillimore, for the defendants. The tender made by the defendants is a most liberal one, and the Court ought to pronounce for it: *The Andrina.* (2)

SIR ROBERT PHILLIMORE. This is an action of salvage to recover for salvage services rendered to a derelict vessel of very considerable value. The services lasted about thirty-five days, and were rendered to a ship and cargo of the value of over 5000*l.* One circumstance to bear in mind in this case is, that the vessel was laden with a full cargo of pitch pine, and therefore was not so likely to perish at sea; she had not a cargo of iron, as in the case of *The Rasche* (1) to which I have been referred. It is not necessary, after the full statement made by counsel and looking to the fact that the salvage service is not disputed, to repeat the averments in the statement of claim. I will just state a summary of what is admitted to have been in every respect the true condition of the vessel. She had lost her rudder, her mainyard was carried away, her two lower topsails were gone, and her upper fore and main topsails were split, and other sails were about the decks torn in pieces. The mainhatch was broken and the fresh water tank was found to be full of salt water, the bulwarks were smashed on both sides, and the port pump was out of order, and it was estimated that there was about 4 feet 6 inches of water in the hold. It is difficult to describe a vessel in a worse condition than that in which she is admitted to have been. What happened was this: an attempt was made to tow her, and it was found that the towing was extremely difficult and inconvenient. The chief mate and others of the crew of the *Teutonia* volunteered to go on board the vessel and take her to her destination 800 miles off. During the time they were on board these salvors suffered considerable hardships and were exposed to great peril. Altogether the case constitutes

(1) L. R. 4 A. & E. 127. (2) L. R. 3 A. & E. 286.

a case of very great merit. The question is whether the tender of 1800*l.* is sufficient. Looking to all the circumstances of the case I shall increase the tender to 2300*l.*

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Butt, Q.C. Will your Lordship apportion the award among the plaintiffs?

SIR ROBERT PHILLIMORE. The Court has always found it of great assistance in these cases that the counsel for the plaintiffs should state to the Court a scheme for the apportionment.

Butt, Q.C. The apportionment might be as follows:—500*l.* to the owners of the *Teutonia*, 100*l.* to the master of the *Teutonia*, 1550*l.* to be divided among the actual salvors, and the remainder of the award, 150*l.*, to the rest of the crew of the *Teutonia*.

SIR ROBERT PHILLIMORE. I will apportion the award in the manner the counsel for the plaintiffs suggests. The award of 500*l.* to the owners of the *Teutonia* is to cover all expenses, and the 1550*l.* awarded to those of the crew of the *Teutonia* who volunteered to remain on board the *Craigs* is to be divided amongst them according to their rating, any substitutes amongst them to share as if they had had the rating of A. B.'s.

Solicitor for plaintiffs: *Wynne.*
Solicitors for defendants: *Waltons, Bubb, & Walton.*

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Feb. 24.

THE AFRIKA. (1879 B. 306.)

Salvage—The Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 182—*Agreement for Apportionment of Salvage.*

The 182nd section of the Merchant Shipping Act, 1854, does not prevent seamen who are entitled to recover salvage remuneration from entering into an arrangement through their solicitor for the apportionment of the amount due to them.

Where the owners of a ship have received a lump sum in respect of services rendered by their ship, master and crew, and have paid over to the crew a portion of such sum, which the crew, acting under the advice of their own solicitor, have accepted in settlement of their claims for salvage, the Court will not, where the portion so paid over is not extravagantly small, disturb the settlement in the absence of fraud or concealment.

THIS was an action for distribution of salvage carried on on behalf of four able seamen and two freemen who formed part of the crew of the steamship *Durham*, against the owners of the steamship *Durham*. The *Durham* is a vessel of 1827 tons gross register, and in March, 1879, when in the Gulf of Finland, and manned by a crew of twenty-seven hands, all told, she rendered salvage services to the steamship *Afrika*. The statement of claim described at some length the services rendered by the *Durham* and her crew to the *Afrika*, and then proceeded as follows:—

13. The defendants have received for and in respect of the said services, the sum of 3000*l.*, as and for salvage reward for the services rendered as aforesaid, to the *Afrika*, her crew and cargo, and before its ascertainment or receipt, they paid to the plaintiffs 12*l.* 10*s.* each on account of the sums due to them in respect of their services aforesaid, but the defendants, though requested by the plaintiffs so to do, have wholly refused to pay to the plaintiffs or any of them, any further sum or sums as their equitable proportion of the said sum of 3000*l.*, and there still remains due and owing from the defendants to the plaintiffs, a large sum as such proportion as aforesaid, and the plaintiffs are unable to obtain the same without the assistance of this Honourable Court.

The plaintiffs claim—

1. Judgment pronouncing that the plaintiffs are entitled to an equitable proportion of the said sum of 3000*l.* in respect of their services aforesaid, and for such sum beyond the said sums paid to the plaintiffs respectively as aforesaid, as to the Court shall seem just.

The defendants delivered a statement of defence, of which the 5th, 6th, and 9th paragraphs were in substance as follows:—

5. The defendants admit that the plaintiffs took their fair part with the other members of the crew of the *Durham*, in and about the rendering of the services

in the statement of claim mentioned, save certain extra services which were rendered by certain members of the crew of the *Durham* other than the plaintiffs, and they admit that the services rendered to the *Afrika* were necessarily of an arduous nature and attended with some exposure and risk, and that by these services the *Afrika*, her cargo and crew, were saved.

6. In answer to the 13th paragraph, the defendants admit and allege that they have received the sum of 3000*l.* and no more, as and for salvage reward for and in satisfaction of all claims for all the said services rendered to the *Afrika*, her crew and cargo, by the *Durham*, her master and crew, and they say that the plaintiffs and certain other members of the said crew of the *Durham*, namely, J. W. Good, T. Wilkinson, and A. Anderson, instructed Messrs. Singleton & Martinson, solicitors, to act as their solicitors, and to apply on their behalf to the defendants for the payment of their respective shares of the said salvage, and authorised the said solicitors to settle their respective claims in respect of the said salvage with the defendants, and that after the said sum of 3000*l.* had been finally ascertained and settled as the total amount of salvage in respect of the said services, and after such sum had come to the hands of the defendants or their agents, and after the said plaintiffs and their said solicitors had full knowledge thereof, the said plaintiffs and the said J. W. Good, T. Wilkinson, and A. Anderson, by their said solicitors agreed with the defendants to accept from the defendants the sum of 132*l.* 10*s.*, in settlement of the claims of the plaintiffs, and the said J. W. Good, T. Wilkinson, and A. Anderson respectively, for and in respect of the said salvage and their costs; and the sum of 132*l.* 10*s.* was on the 8th day of July, 1879, accordingly paid by the defendants, and received by the said solicitors acting on behalf and with the authority of the plaintiffs and the said J. W. Good, T. Wilkinson, and A. Anderson, in settlement of their said respective claims for salvage and costs. The defendants crave leave to refer to the authority in writing given by the said plaintiffs to the said solicitors, and to the receipt for the said sum of 132*l.* 10*s.*

9. Save as herein admitted, the defendants deny the truth of the said 13th paragraph.

The plaintiffs demurred to the 6th paragraph of the statement of defence.

J. P. Aspinall, for the plaintiffs, in support of the demurrer, contended that it was apparent on the pleadings that the plaintiffs had received an inadequate amount in respect of the services they had rendered, and that the agreement referred to in the paragraph demurred to amounted to a stipulation by the plaintiffs to abandon their right to salvage, and was illegal and void under the provisions of s. 182 of the Merchant Shipping Act, 1854: *The Rosario* (1); *The Enchantress.* (2)

E. C. Clarkson, for the defendants, contrà.

(1) 2 P. D. 41. (2) Lush. 93.

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THE AFRIKA.

SIR ROBERT PHILLIMORE. This is a case of distribution of salvage. A steamship called the *Durham* rendered salvage services in 1879 in the Gulf of Finland to a ship called the *Afrika*, and 3000*l.* has been accepted as the total sum of salvage remuneration for such services, and paid over to the owners of the *Afrika*. Certain of the crew have brought the present action, in which they claim such portion of this sum as is due to them, and the owners of the *Afrika*, who have appeared to defend the suit, rest their case upon the 6th paragraph of the statement of defence. [His Lordship here read the paragraph.] This paragraph is demurred to, principally upon the ground that it sets up an agreement to accept a certain sum in respect of salvage remuneration, contrary to the provisions of the 182nd section of the Merchant Shipping Act, 1854, which renders it unlawful for any seaman to abandon any right he may have or obtain in the nature of salvage, and declares that any agreement to do so shall be wholly inoperative. Now it has been urged by counsel for the plaintiffs that the Court must hold that any agreement, of any sort or kind by which a solicitor is to receive a certain sum in respect of salvage services in lieu of the sum which might be awarded by the Court as salvage remuneration, is invalid, and that any arrangement of that kind is wholly inoperative. I think that to hold thus would be to draw an unwarrantable conclusion from the words of the section. In my opinion, therefore, the demurrer cannot be allowed. I should not, however, take the course of rejecting the demurrer if by so doing I was preventing the plaintiffs traversing the facts alleged in the 6th paragraph of the statement of defence. On this point I think it necessary to refer to the law laid down in the *Enchantress* (1), and I take the law as laid down in that case to be perfectly clear. In that case Dr. Lushington said:—

> I conceive a duty is hereby imposed upon me to decree, upon application made, what in my judgment is an equitable apportionment of salvage, unless I am barred by one or two circumstances—either an equitable agreement between the parties, or an equitable tender.

Dr. Lushington goes on to say:—"I will consider the present case in both ways. First, was there an equitable agreement

(1) Lush. 93.

made between the parties?" Now, in the present case the terms of the agreement are not yet before the Court for its consideration, and will only be before it when the matter is properly brought before it at the hearing, when one of the questions to be determined will be whether the agreement, having been made by solicitors and approved by the parties, was, having regard to all the circumstances, an equitable agreement. On the one hand, I think it is competent for the defendants to set up the defence they have set up in the 6th paragraph of the statement of defence, to the effect that, irrespective of any question whether the agreement was or was not equitable, it was an agreement with the defendants, and that the plaintiffs' solicitors received the 132*l.* 10*s.*, and that that sum was accepted by the plaintiffs; in other words, I conceive it was perfectly competent for the defendants to plead in the manner they have pleaded. On the other hand, I conceive it was equally competent for the plaintiffs to have alleged that, admitting the fact that the solicitors did make the agreement in question, nevertheless, having regard to all the circumstances, the agreement was one of those inequitable agreements, either fraudulent or illusory, which the Court has always felt itself competent to look into, and, if necessary, revise. Taking that view of the law, I reject the demurrer in this case, and I wish it to be understood that I do so upon the grounds I have stated.

An amended reply was afterwards delivered, of which the following is the material part:—

3. As to paragraph 6 of the statement of defence the plaintiffs further say that if the agreement in the said paragraph mentioned was made and if the sum of 132*l.* 10*s.* was paid to the said solicitors in the said paragraph mentioned under the said agreement, as in the said paragraph alleged (which the plaintiffs do not admit) the plaintiffs' part of the said sum, that is to say 12*l.* 10*s.* each, was less than the just and equitable share of the said sum of 3000*l.*, due to the plaintiffs in respect of the said salvage services, and the said solicitors received the said part in settlement of the claims of the plaintiffs in ignorance of the just rights of the plaintiffs, and the said agreement and receipt limited the proportion of the said sum of 3000*l.*, due to the plaintiffs, and surrendered without any consideration whatsoever the just rights of the plaintiffs to the remaining part of their fair share, and were and are inequitable and inoperative as against the plaintiffs.

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The defendants delivered a rejoinder joining issue on the 3rd paragraph of the amended reply, and demurring to the same paragraph upon the ground, inter alia, that the said paragraph did not contain any good or sufficient ground for avoiding the agreement and settlement and payment pleaded in the 6th paragraph of the statement of defence.

Feb. 24. The action and the demurrer to the reply came on to be heard.

Witnesses were examined orally in court on behalf of the plaintiffs and the defendants. The result of their evidence can be gathered from the judgment.

Milward, Q.C., and *Aspinall*, for the plaintiffs, submitted that the agreement set up in the 6th paragraph of the statement of defence was so inadequate, that the Court would disregard it and award a further sum to the plaintiffs.

E. C. Clarkson, and *Phillimore*, for the defendants, contended that even although the amount received by the plaintiffs should be considered less than would have been awarded by the Court, yet the arrangement, having been made in good faith and by competent advisers on behalf of the plaintiffs, ought not to be disturbed.

SIR ROBERT PHILLIMORE. I am of opinion that the agreement in this case does not militate against the provisions of the 182nd section of the Merchant Shipping Act, 1854. The question before me is not whether if the plaintiffs had been plaintiffs in an action of salvage the Court would have awarded them more or less than the sum which they have agreed to accept, but whether any good ground has been shewn for the Court interfering with the arrangement that has been made. No doubt if any fraud or concealment had been shewn the Court would not hesitate to have the whole case re-opened, but in my opinion no evidence has been offered tending to shew any fraud or concealment or any disreputable conduct in order to induce the plaintiffs to sign a receipt. Throughout the whole transaction they were assisted by a solicitor, who appears to have acted in perfect good faith, and indeed there is nothing extravagantly wrong in the settlement itself. In these

circumstances it would, in my opinion, be wrong to allow the matter to be re-opened. I must therefore dismiss the action with costs. 1880. THE AFRIKA.

Solicitor for plaintiffs: *H. C. Coote.*
Solicitors for defendants: *Rollit & Sons.*

Referred to. DOLLFUS MIEG CASE. [1949] 1 Ch. 369

[IN THE COURT OF APPEAL.]

Feb. 27.

THE PARLEMENT BELGE. (1878. O. 60.)

Public Vessel—Exemption from Arrest—Trading by Public Vessel.

As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory:—

Considered. SULTAN OF JOHORE *v.* ABU-BAKAR [1952] A.C. 318

Held, therefore, reversing the decision of the Admiralty Division, that an unarmed packet belonging to the sovereign of a foreign state, and in the hands of officers commissioned by him, and employed in carrying mails, is not liable to be seized in a suit in rem to recover redress for a collision, and this immunity is not lost by reason of the packet's also carrying merchandize and passengers for hire.

THIS was an appeal on behalf of the Crown from a decision of Sir R. J. Phillimore. (1)

1879. Dec. 11, 12, 13, 20. *Sir H. S. Giffard, S.G.*, the Admiralty Advocate (*Dr. Deane, Q.C.*), and *A. L. Smith*, for the appeal. This is a public ship, and apart from the convention she is not liable to seizure. She belongs to the King of the Belgians in his public character, and if she was trading contrary to her public character that is a question which cannot be raised by a private foreigner though our government might have a right to complain. The property of one sovereign is not subject to seizure in the territories of another, and that the vessel is not armed makes no difference. The carrying arms is only the most usual proof that a ship belongs to the government and is employed for public purposes. *The Exchange* (2) was a strong case, but it has always

(1) 4 P. D. 129. (2) 7 Cranch, 116.

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been accepted. Any property of a sovereign is protected: *Vavasseur* v. *Krupp*. (1) The goods on board may not be protected, but that does not affect the ship: *The Prins Frederik* (2); *Briggs* v. *The Light-ships*. (3) This ship is employed by the King of the Belgians, officered by him, and carries his flag. She has been invited to the ports of this country under the belief that irrespective of the treaty she would not be subject to our laws. Moreover, she has been declared by the Crown to be a public ship, and this declaration is conclusive. The Court cannot go behind the declaration of the Crown as to the political status either of persons or things. The Crown determines what is an independent government. The Crown declares a blockade, and many other cases may be put. It is argued that this gives the Crown a power inconsistent with the constitution, but that is not so.

[BRETT, L.J. Can her Majesty give to a private ship privileges not recognised by international law?]

It is not necessary to say that she can, but her Majesty's declaration that the ship is a public ship is conclusive. The international law is part of the common law of England: *Triquet* v. *Bath* (4), and by international law a public ship is free from arrest. The general language of Acts of Parliament however large is construed salvo jure reginæ.

[*Webster, Q.C.* That is not disputed.]

Then the question is, whether her Majesty can recognise, and by recognising affirm, the political character of a thing so as to free it from the ordinary jurisdiction of the Courts. Every person residing here is subject to the laws of this country, and the proposition in Viner's Abridgment, Prerogative, T. 7, 8, that the Queen cannot give a foreigner an exemption from being impleaded here is not disputed, but if by a principle of international law a person having a particular character is not liable to be so impleaded the Queen's recognition of him as having that character is conclusive in all her Courts.

[BRETT, L.J. I do not feel clear that if her Majesty chose thus to recognise as ambassador a person who had not been sent by any foreign government he could claim the privileges of an ambassador.

(1) 9 Ch. D. 351.
(2) 2 Dod. 451.
(3) 11 Allen (Mass.), 157.
(4) 3 Burr. 1478.

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JAMES, L.J. How can any municipal court try that question? I apprehend that we should be bound to act on the representation of the Foreign Office.]

The appellants merely use the treaty in the present case in order to get rid of the argument that the ship is not a public ship because of her trading. Were it not for that they would simply rely on her being a public ship.

[BAGGALLAY, L.J. Suppose the conditions in Article X. of the treaty were broken, is the ship still privileged?]

Yes, until the treaty is abrogated for breach it remains in force: Kent Comm. I. 183.

[JAMES, L.J. Would a treaty that all Belgian ships should have the privileges of Belgian ships of war be binding?]

It is not necessary to say that it would, but only that the allegation that the ship is a public ship is conclusive. As to her being a public ship, the question is now what is the purpose for which she is used? The distinction is not between public ship of war and private ship of war, but between public ship and private ship. The law is summed up in 1 Phill. Int. Law, 404, 2nd ed. According to that, what is the evidence of the character of the ship—armament, or commission? No doubt commission. A transport or troop-ship commanded by an officer holding a commission from government is a public ship, though unarmed; a privateer though armed is not. A vessel belonging to a sovereign in his public capacity is a public ship whether armed or not: *Briggs* v. *The Light-ships.* (1) In the case of *The Constitution* (2), a public vessel, though carrying cargo, was held privileged. An armed frigate belonging to a government is undoubtedly privileged—but suppose her steam launch, which is not armed, ran down a vessel, she certainly would also be privileged as part of the fleet. Trading cannot take away the privilege, for if so it would take away the privilege from a man of war. *The Santissima Trinidad.* (3)

Webster, Q.C., and *Phillimore,* contrà. This vessel was in fact mainly employed as a trading vessel. The fact of a vessel being in the possession of the sovereign of a country does not

(1) 11 Allen (Mass.), 157, 165, 186. (2) 4 P. D. 39.
(3) 7 Wheat. 283.

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necessarily make her a public vessel, and she is not so if she is employed in carrying goods and passengers for hire. The privilege is by international law confined to vessels which form part of the armed force of a country: *The Exchange.* (1) The reasoning in which case (2) is inconsistent with the idea that the Court went only on the public character of the vessel apart from her being armed. In *United States* v. *Wilder* (3) general average was enforced against goods of the United States, it being held that the property of a sovereign is not exempt from process. Halleck's Int. Law, p. 176, ed. 1878, and Phill. Int. Law, vol. i. 2nd ed. p. 343, et seqq., support this contention. The opinion of Lord Stowell set out in the Report of 1876 by the Royal Commission on Fugitive Slaves, p. lxxvi, is in terms which imply that he did not consider a public ship to stand on the same footing as a ship of war. Being owned by a sovereign is not sufficient to give privilege to a ship, and, unless carrying mails is such a public service as to give privilege to ships employed in it, this is not a ship employed for a public purpose. No vessel employed in carrying on a mere commercial enterprise has ever been held privileged. Again, this is not a suit properly speaking against the owners, there is no personal citation to them, it is a proceeding in rem to perfect an inchoate maritime lien: *The Bold Buccleugh* (4); and this is no breach of the privilege if any exists.

[JAMES, L.J. According to your argument any one may seize the ship of a foreign sovereign unless he will appear and defend, which is derogatory. The distinction between giving a remedy against the sovereign and giving a remedy seems unsubstantial.]

The Courts have treated the difference as substantial. In *The Ticonderoga* (5) there was a collision while the vessel was engaged in the French service, and in an action in rem, after the determination of the charterparty, a remedy was enforced against the ship, which shews that there may be a right against the ship which is suspended, for there the ship could not have been proceeded against at the time.

[BRETT, L.J., referred to *The Athol* (6).]

(1) 7 Cranch, 116.
(2) 7 Cranch, 116, at p. 142.
(3) 3 Sumn. 308, 313.
(4) 7 Moo. P. C. 267.
(5) Swa. 215.
(6) 1 Wm. Rob. 374.

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The Solicitor-General says this is the first attempt to attach a vessel under these circumstances, but until the case of *The Exchange* (1) it was doubtful whether even a ship of war had the privilege.

[JAMES, L.J. That is mere matter of history. You admit it to be settled that she has such a privilege.]

The observations of Lord Stowell in *The Prins Frederik* (2) shew that at that time he did not consider it any absurdity to suppose that a ship of war could be arrested. The freedom from arrest is of modern growth and ought not to be extended. Ships of war stand on a different footing from other public vessels, the expeditions on which they are sent may be of the most important immediate consequence to the country. Moreover they are under martial law, and if they were to be held subject to civil law there would be a conflict: Ortolan de la Diplomacie de la Mer, 2nd ed. bk. ii. c. 10, 211, 217. In *Morgan* v. *Lariviere* (3) the title to property was decided upon adversely to a foreign government.

[JAMES, L.J. There was a trustee who could be sued here.

BAGGALLAY, L.J. The observations on page 433 shew that the case is no authority for the present case.]

In *Gladstone* v. *Musurus Bey* (4) there was a decision against a foreign sovereign.

[JAMES, L.J. There again the property was in trustees.]

The case of *Vavasseur* v. *Krupp* (5) has been referred to, but there the ships were not in use in this country, and the object of the action was to deal with property in the absence of the owner. In *Taylor* v. *Best* (6) an action against several defendants, one of whom was privileged, having been allowed to go on to replication, the privilege was not allowed. There also Jervis, C.J., said that if the suit could proceed without proceeding against the person of the ambassador it could go on, and the same principle was laid down in the *Maddalena Steam Navigation Co.* v. *Martin.* (7) In *The Santissima Trinidad* (8) it is laid down that the question whether a ship is a public ship must be

(1) 7 Cranch, 116.
(2) 2 Dods. 451, 484, 485.
(3) Law Rep. 7 H. L. 423.
(4) 1 H. & M. 495; 32 L. J. (Ch.) 155.
(5) 9 Ch. D. 351.
(6) 14 C. B. 487; 23 L. J. (C.P.) 89.
(7) 2 E. & E. 94; 28 L. J. (Q.B.) 310.
(8) 7 Wheat. 283.

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tried by the Court, and that the property of a sovereign may be seized by a proceeding in rem. The case of *Briggs* v. *The Light-ships* (1) is distinguishable, for the suit was not an Admiralty suit in rem, but a suit to enforce a statutory local lien which could not be enforced without personal citation. The *United States* v. *Wilder* (2) shews that this makes a difference. It is said that as a man cannot sue his own sovereign, so by the comity of nations he cannot sue a foreign sovereign; but the rule is not co-extensive in the two cases. If the ship is not a ship of war the proceeding in rem is allowable, though a foreign sovereign be the owner. *Prioleau* v. *United States* (3); *The Marquis of Huntley* (4); *The Cybele* (5); and Bynkershoek favour this view.

[THE COURT intimated that the effect of the convention need not be argued at present.]

Sir H. S. Giffard, S.G., in reply. The respondents refer to Bynkershoek, but do not cite him, for he proves too much; he maintains that ships of war can be seized, a doctrine which all the text writers repudiate: Wheaton's Int. Law, 199, ed. Lawrence. The case of *The Santissima Trinidad* (6) is treated of in *Briggs* v. *The Light-ships* (7), and explained by the Court. It was a question of prize or no prize, which by the consensus of nations is remitted to the prize courts. The privilege depends on the immunity of the sovereign, not on anything peculiar to a ship of war, though it seldom arises as to anything else, because hardly anything belonging to a sovereign in his public capacity, except a ship of war, ever goes wandering into the jurisdiction of foreign courts. As regards the distinction between proceedings in rem and in personam, it is difficult to understand an action against a thing. A proceeding in rem is only a mode of suing the owners. Precisely the same argument was used in the case of *The Exchange* (8) as here, that there was nothing derogatory to the dignity of a sovereign in a proceeding in rem against his property, but it did not prevail. *Wadsworth* v. *Queen of Spain* (9) and *De Haber* v.

(1) 11 Allen (Mass.) 157.
(2) 3 Sumn. 308.
(3) Law Rep. 2 Eq. 659.
(4) 3 Hagg. 246.
(5) 3 P. D. 8.
(6) 7 Wheat. 283.
(7) 11 Allen (Mass.) 157.
(8) 7 Cranch, 116.
(9) 17 Q. B. 171.

Queen of Portugal (1) support the view that a proceeding against property is a mode of suing the owner.

[JAMES, L.J. But for the Admiralty Court Act, 1861 (24 Vict. c. 10), this ship could not have been proceeded against in the Admiralty Court, as the collision did not take place on the high seas. It would be rather singular if an English statute, passed only for the more convenient distribution of business, were to be held to affect the rights of a foreign sovereign.]

Cur. adv. vult.

1880. Feb. 27. The judgment of the Court (James, Baggallay, and Brett, L.JJ.) was delivered by

BRETT, L.J. In this case proceedings in rem on behalf of the owners of the *Daring* were instituted in the Admiralty Division, in accordance with the forms prescribed by the Judicature Act, against the *Parlement Belge*, to recover redress in respect of a collision. A writ was served in the usual and prescribed manner on board the *Parlement Belge*. No appearance was entered, but the Attorney-General, in answer to a motion to direct that judgment with costs should be entered for the plaintiffs, and that a warrant should be issued for the arrest of the *Parlement Belge*, filed an information and protest, asserting that the Court had no jurisdiction to entertain the suit. Upon the hearing of the motion and protest the learned judge of the Admiralty Division overruled the protest and allowed the warrant of arrest to issue. The Attorney-General appealed. The protest alleged that the *Parlement Belge* was a mail packet running between Ostend and Dover, and one of the packets mentioned in Article 6 of the Convention of the 17th of February, 1876, made between the sovereigns of Great Britain and Belgium; that she was and is the property of his Majesty the King of the Belgians, and in his possession, control, and employ as reigning sovereign of the state, and was and is a public vessel of the sovereign and state, carrying his Majesty's royal pennon, and was navigated and employed by and in the possession of such government, and was officered by officers of the Royal Belgian navy, holding commissions, &c. In answer it was averred on affidavits, which were not contradicted, that the packet boat,

(1) 17 Q. B. 196.

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besides carrying letters, carried merchandize and passengers and their luggage for hire.

Three main questions were argued before us: (1.) Whether, irrespective of the express exemption contained in Article 6 of the Convention, the Court had jurisdiction to seize the Belgian vessel in a suit in rem; (2.) whether, if the Court would otherwise have such jurisdiction, it was ousted by Article 6 of the Convention; (3.) whether any exemption from the jurisdiction of the Court, which the vessel might otherwise have had, was lost by reason of her trading in the carriage of goods and persons. In the course of the argument we desired that it might, in the first instance, be confined to the first and third questions, reserving any further argument on the second question to be heard subsequently, if necessary. We have come to the conclusion that no such argument is necessary. We, therefore, give no opinion upon the second question. We neither affirm nor deny the propriety of the judgment of the learned judge of the Admiralty Division on that question.

The proposition raised by the first question seems to be as follows: Has the Admiralty Division jurisdiction in respect of a collision to proceed in rem against, and, in case of non-appearance or omission to find bail, to seize and sell, a ship present in this country, which ship is at the time of the proceedings the property of a foreign sovereign, is in his possession, control, and employ as sovereign by means of his commissioned officers, and is a public vessel of his state, in the sense of its being used for purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war or employed as a part of the military force of his country? On the one side it is urged that the only ships exempted from the jurisdiction are armed ships of war, or ships which, though not armed, are in the employ of the government as part of the military force of the state. On the other side it is contended that all moveable property, which is the public property of a sovereign and nation used for public purposes, is exempt from adverse interference by any court of judicature. It is admitted that neither the sovereign of Great Britain nor any friendly sovereign can be adversely personally impleaded in any

court of this country. It is admitted that no armed ship of war of the sovereign of Great Britain or of a foreign sovereign can be seized by any process whatever, exercised for any purpose, of any court of this country. But it is said that this vessel, though it is the property of a friendly sovereign in his public capacity and is used for purposes treated by him as public national services, can be seized and sold under the process of the Admiralty Court of this country, because it will, if so seized and sold, be so treated, not in a suit brought against the sovereign personally, but in a suit in rem against the vessel itself. This contention raises two questions: first, supposing that an action in rem is an action against the property only, meaning thereby that it is not a legal proceeding at all against the owner of the property, yet can the property in question be subject to the jurisdiction of the Court? Secondly, is it true to say that an action in rem is only and solely a legal procedure against the property, or is it not rather a procedure indirectly, if not directly, impleading the owner of the property to answer to the judgment of the Court to the extent of his interest in the property?

The first question really raises this, whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every Court as is the person of every sovereign. Whether it is so or not depends upon whether all nations have agreed that it shall be, or in other words, whether it is so by the law of nations. The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations. An equal exemption from interference by any process of any Court of some property of every sovereign is admitted to be a part of the law of nations. The universal agreement which has made these propositions part of the law of nations has been an implied agreement. Whether the law of nations exempts all the public property of a state which is destined to the use of the state, depends on whether the principle, on which the agreement has been implied, is as applicable to all that other public property of a sovereign or state as to the public property which is admitted to be exempt. If the principle be equally applicable to all public property used as such, then the agreement to exempt ought to be implied with regard to all such

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public property. If the principle only applies to the property which is admitted to be exempt, then we have no right to extend the exemption.

The first question, therefore, is—What is the principle on which the exemption of the person of sovereigns and of certain public properties has been recognised? "Our king," says Blackstone (B. 1, c. 7), "owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress, and the sentence of a Court would be contemptible unless the Court had power to command the execution of it, but who shall command the king?" In this passage, which has been often cited and relied on, the reason of the exemption is the character of the sovereign authority, its high dignity, whereby it is not subject to any superior authority of any kind. "The world," says Wheaton, adopting the words of the judgment in the case of *The Exchange* (1), "being composed of distinct sovereignties, possessing equal rights and equal independence, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers." "This perfect equality and absolute independence of sovereigns has given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation." "One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory. Why have the whole world concurred in this? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation." By dignity is obviously here meant his independence of any superior authority. So Vattel, Lib. 4, c. 7, s. 108, speaking of sovereigns, says:—"S'il est venu en voyageur, sa dignité seule, et ce qui est dû à la nation qu'il représente et qu'il gouverne, le met à couvert de toute insulte, lui

(1) 7 Cranch, 116.

assure des respects et toute sorte d'égards, et l'exempte de toute juridiction."

In the case of *The Duke of Brunswick* v. *The King of Hanover* (1), the suit was against the king. There was a demurrer to the jurisdiction. Lord Langdale in an elaborate judgment allowed the demurrer. He rejected the alleged doctrine of a fictitious extra-territoriality; he admitted that there are some reasons which might justify the exemption of ambassadors which do not necessarily apply to a sovereign, but he nevertheless adopted an analogy between the cases of the ambassadors and the sovereign, and allowed the demurrer on the ground that the sovereign character is superior to all jurisdiction. "After giving to the subject," he says (2), "the best consideration in my power, it appearing to me that all the reasons upon which the immunities of ambassadors are founded do not apply to the case of sovereigns, but that there are reasons for the immunities of sovereign princes, at least as strong if not much stronger than any which have been advanced for the immunities of ambassadors; that suits against sovereign princes of foreign countries must, in all ordinary cases in which orders or declarations of right may be made, and in requests for justice, which might be made without any suit at all; that even the failure of justice in some particular cases would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of princes and nations, I think that on the whole it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the Courts there."

From all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority. By a similar examination of authorities we come to the conclusion, although other grounds have sometimes been suggested, that the immunity of an ambassador from the jurisdiction of the Courts of

(1) 6 Beav. 1. (2) 6 Beav. 1, at p. 50.

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the country to which he is accredited is based upon his being the representative of the independent sovereign or state which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be.

The reason of the exemption of ships of war and some other ships must be next considered, and the first case to be carefully considered is, and always will be, *The Exchange.* (1) It is undoubted that the decision applies, in fact, only to the case of a ship of war. Yet, in considering what was the principle on which the judgment was founded, there are some important circumstances to which attention must be directed. The plaintiffs filed their libel against the schooner *Exchange,* found in an American port, and prayed for the usual process to attach the vessel, and that she might be restored to her owners. Upon this libel the usual process in a cause of restitution was issued and executed, that is to say, the vessel was detained. There was no appearance in the suit. Then the usual proclamations issued for all persons to appear and shew cause why the vessel should not be restored to the owners. No person appeared. Then the Attorney-General of the United States appeared and filed a suggestion. In this it must be noticed that the vessel is not described as "an armed ship of war," but as "a certain public vessel belonging to his Imperial Majesty, and actually employed in his service." It certainly is to be remarked that those who conducted this case with unusual ability, deliberately, in stating the cause of objection, rested the claim of exemption not on the fact of the vessel being an armed ship of war, but on the fact of her being one of a larger class, namely, "a public vessel belonging to a sovereign, and employed in the public service." It is upon the suggestion so pleaded, that the Court gives judgment. It is right, however, to say that the fact of the vessel being an armed ship of war was before the Court, and that the judgment frequently uses that phrase, though by no means invariably. It is impossible within reasonable bounds to set out the elaborate judgment of Marshall, C.J., and the Court. The reasoning seems to be as

(1) 7 Cranch, 116.

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follows:—The ship is within the territorial jurisdiction of the United States—primâ facie the Court of the United States has jurisdiction. But all nations have agreed to certain limitations of their absolute territorial jurisdiction—as, for instance, they have abjured all personal jurisdiction over a foreign sovereign within their territory, and this on account of his dignity, and all personal jurisdiction over foreign ministers, and, says the judgment, this is on the same principle; and all jurisdiction over a foreign army passing through the territory. Is the same immunity to be held to apply to ships of war? The judgment answers, Yes, and upon the same principle: i.e., that to hold otherwise would be inconsistent with the dignity—that is to say, the recognised independence of the foreign sovereign. After dealing with the case of private foreigners and merchant vessels in a foreign country, the judgment continues, "But in all respects different is the situation of a public armed ship; she constitutes a part of the military force of her nation, acts under the immediate and direct command of her sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and dignity. The implied license therefore under which such vessel enters a friendly port may reasonably be construed, and it seems to the Court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality."

The Prins Frederik (1) seems to us to be worthy of great attention. An armed ship of war belonging to the King of the Netherlands, was arrested on a claim for salvage. The case was elaborately argued upon the question of jurisdiction. An argument of the closest and most forcible reasoning, to which we see no answer, was presented by Dr. Arnold, the Admiralty advocate (see p. 466). "There is a class of things," he says, "which are not subject to the ordinary rules applying to property, which are not liable to the claims or demands of private persons, which are described by civilians as extra commercium, and in a general enumeration are by them denominated sacra religiosa, publica

(1) 2 Dod. 451.

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publicis usibus destinata. These are things which are allowed to be, and from their nature must be, exempt and free from all private rights and claims of individuals, inasmuch as if these claims were to be allowed against them, the arrest, the judicial possession and judicial sale incident to such proceedings would divert them from those public uses to which they are destined. Ships of war belonging to the state are included in this class of things, by their nature and of necessity arising from their nature. The same inconvenience which would arise from such proceedings in the courts of their own country, would equally arise if such vessels could be arrested and detained in a foreign port. There is another point of view. It is the interest and duty of every sovereign independent state to maintain unimpeached its honour and dignity." The point and force of this argument is that the public property of every state, being destined to public uses, cannot with reason be submitted to the jurisdiction of the Courts of such state, because such jurisdiction, if exercised, must divert the public property from its destined public uses; and that, by international comity, which acknowledges the equality of states, if such immunity, grounded on such reasons, exist in each state with regard to its own public property, the same immunity must be granted by each state to similar property of all other states. The dignity and independence of each state require this reciprocity. It was this reasoning which induced Sir William Scott to hesitate to exercise jurisdiction, and so to act as to intimate his opinion that the reason could not be controverted. The case has always been considered as conveying his opinion to have been to that effect. Such was the view of Lord Campbell, who in *De Haber* v. *The Queen of Portugal* (1) says that the difficulties suggested by the argument were in the opinion of Sir William Scott insuperable. But if so, he assented to an argument which embraced in one class "all public property" of the state, and treated "armed ships of war" as a member of that class.

In the case of *The Athol* (2) Dr. Lushington certainly extended the immunity from jurisdiction to a troopship, which was not an armed ship of war, though she was employed in a sense as part of the military force of the country. The reason of his judgment

(1) 17 Q. B. 171. (2) 1 Wm. Rob. 374.

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was in terms that in cases of tort or damage committed by vessels of the Crown, the legal responsibility attaches to the actual wrongdoer only. That is in effect to say that the vessels of the Crown cannot be touched.

We come next to the important case of *Briggs* v. *The Light-ships*. (1) By the Massachusetts Statute it was enacted that "any person to whom money is due for labour and materials furnished in the construction of a vessel shall have a lien upon her, which lien may be enforced by petition to the superior Court praying for a sale of the vessel. The petition may be entered or filed, a process of attachment issue against the vessel, and notice be given to the owner thereof to appear and answer to the petition." This enactment gave a statutory lien on the vessel, to be enforced by process of a Court. It is a more extensive lien than the common law possessory lien in respect of work done on the vessel, as it is not lost by loss of possession. It is to be enforced by the same process as a maritime lien. It is therefore in effect an enactment which applies the incidents of a maritime lien to a new subject-matter, viz., a claim for work and labour in the construction of a vessel. It follows that upon the point raised in that case the reasoning must be as applicable to every maritime lien, and the means of enforcing it, as to that similar statutory lien. Now, in that case the plaintiffs filed a petition and prayed an attachment and sale of the vessel. The Court thereupon issued process of attachment and ordered notice to be given to the United States by service on their attorney. The vessel was attached and notice given accordingly. The United States appeared specially and pleaded to the jurisdiction, that at the time of the filing of the petition the vessels were the public property of the United States and in their possession, and held and owned by them for public uses, and as instruments employed by them for the execution of their sovereign and constitutional powers, and, therefore, not subject to the process or jurisdiction of the Court. The question, therefore, was whether the Court had jurisdiction to take possession of the vessels in order to sue them if necessary, and to give notice to the government that if they had any objection to such sale they must appear? Every step in that case was the same as

(1) 11 Allen, 157.

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in the case of *The Exchange* (1), and as in the present case. The objection to the jurisdiction as pleaded was in substance the same as that pleaded in the case of *The Exchange* (1) and in the present case. The vessels, however, were not ships of war, or vessels employed in the military service of the state. They were like the *Parlement Belge*—vessels which were the public property of the state and in their possession, and held and owned by them for uses treated by them as public. It is obvious that all the arguments which have been used in the present case on behalf of the plaintiffs might have been, and almost certainly were, used in that case. But the Court gave judgment declining the jurisdiction. "It is said for the petitioners" (says the judgment at p. 165) "that these light-boats were not intended for military service. But after they had once come into the possession of the United States for public uses, they were subject to the exclusive control of the Executive Government of the United States, and could not be interfered with by state process. The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty. These reasons have satisfied us that there is no principle upon which the Courts of this Commonwealth can entertain jurisdiction of these petitions." The judgment then reviews many cases, amongst others *The Marquis of Huntley* (2), in which Sir John Nicholl treated "government stores" in charge of a lieutenant, but on board a ship which was only chartered by government, as beyond his jurisdiction, though the ship and freight were within it; *The Schooner Merchant* (3), in Florida, in which it was held that the "mails" could not be arrested or detained for salvage. *The Thomas A. Scott* (4), in which a "transport ship" owned by the United States, but not commissioned, was held to be beyond jurisdiction. The judgment ends thus:—"The exemption of a public ship of war of a foreign government from the jurisdiction of our Courts depends rather upon its public than upon its military character." The reasoning of that careful judgment is the reasoning of the Admiralty advocate in the case of *The Prins Frederik.* (5) The

(1) 7 Cranch, 116.
(2) 3 Hagg. 246.
(3) Marvin on Wreck and Salvage, s. 122.
(4) 10 L. T. (N.S.), 726.
(5) 2 Dod. 451.

ground of that judgment is that the public property of a government in use for public purposes is beyond the jurisdiction of the Courts of either its own or any other state, and that ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property. It puts all the public moveable property of a state, which is in its possession for public purposes, in the same category of immunity from jurisdiction as the person of a sovereign, or of an ambassador, or of ships of war, and exempts it from the jurisdiction of all Courts for the same reason—viz., that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the state.

The judgment of Lord Campbell in *De Haber* v. *The Queen of Portugal* (1) seems to the same effect, though the decision may fairly be said to apply only to a suit directly brought against the sovereign. But he relies on the Statute of Anne with regard to ambassadors, and says, "Can we doubt that in the opinion of that great judge (Lord Holt) the sovereign himself would have been considered entitled to the same protection, immunity, and privilege as the minister who represents him." And he cites the statute thus: "It has always been said to be merely declaratory of the law of nations recognised and enforced by our municipal law, and it provides that all process whereby the person of any ambassador or of his domestic servants may be arrested, *or his goods distrained or seized* shall be utterly null and void." The italics are as written by Lord Campbell. And further, citing *The Prins Frederik* (2), he says, "Objection being made that the Court had no jurisdiction, a distinction was attempted that the salvors were not suing the King of the Netherlands, and that being in possession of and having a lien upon a ship which they had saved, the proceeding might be considered in rem. But Lord Stowell saw such insuperable difficulties in judicially assessing the amount of salvage, the payment of which was to be enforced by sale, that he caused representation to be made to the Dutch Government, who very honourably consented to his disposing of the matter as an arbitrator." The decision therefore is that the immunity of the sovereign is at least as great as the immunity of an ambassador, but as the statute declares that the law is, and always has been, not

(1) 17 Q. B. 171. (2) 2 Dod. 451.

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only that an ambassador is free from personal suit or process, but that his goods are free from such process as distress or seizure, the latter meaning seizure by process of law, it follows that the goods of every sovereign are free from any seizure by process of law.

The latest case on the point seems to be the case of *Vavasseur* v. *Krupp* (1) before this Court. The question was whether the English Court had jurisdiction to order "shells" belonging to the Mikado of Japan to be destroyed, supposing they were an infringement of the plaintiff's patent. All the judges held that there was no such jurisdiction. "I suppose," says James, L.J., "that there is a notion that in some way these shells became tainted or affected through the breach or attempted breach of the patent, but even then a foreign sovereign cannot be deprived of his property because it has become tainted by the infringement of somebody's patent. He says, 'It is my public property, and I ask you for it.' That seems to me to be the whole of the case." Brett, L.J., said, "The goods were the property of the Mikado. They were his property as a sovereign—they were the property of his country." "I shall assume, for this purpose, that there was an infringement of the patent, yet the Mikado has a perfect right to have these goods; no Court in this country can properly prevent him from having goods which are the public property of his own country." And Cotton, L.J., says, "This Court has no jurisdiction, and in my opinion none of the Courts in this country have any jurisdiction to interfere with the property of a foreign sovereign, more especially with what we call the public property of the state of which he is sovereign, as distinguished from that which may be his own private property. The Courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign."

The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every

(1) 9 Ch. D. 351.

other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.

It is said, however, that there are authorities inconsistent with the view that this is a part of international law. The case of *The Santissima Trinidad* (1) is relied on. But, as was pointed out in the judgment in *Briggs* v. *The Light-ships* (2), the former case is one depending upon a well-known doctrine of the law of prize, viz., that property captured in breach of the laws of neutrality is held by the prize courts of the neutral state not to be lawful prize. In the case of the *United States* v. *Wilden* (3) it would be uncandid to say that there are not expressions of Story, J., which are in favour of the contention that the immunity from jurisdiction is confined to ships and materials of war. But in that case the right which was adverse to the United States Government was a possessory lien for general average. The remedy of the shipowner was in his own hands. He required no assistance from any process of any court, as would also be the case in a lien for freight. As a decision, therefore, the case is not in point, because the United States were plaintiffs voluntarily seeking the assistance of the Massachusetts tribunal. But it seems to us sufficient to say that we do not consider the observations of Story, J., to countervail effectually the arguments and decisions in the other cases which have been cited. There is then the opinion of the learned Judge of the Admiralty Division, expressed in the case of *The Charkieh.* (4) The decision is, of course, not in point, because the case was decided on the ground that the Khedive was not an independent sovereign. But there is a careful consideration in the judgment of the question whether the ship would have been liable to the jurisdiction of the Court, in proceedings in rem in respect of a collision, if the Khedive had been a sovereign prince. The conclusion is that she would have been. Such an opinion deserves

(1) 7 Wheat. 283.
(2) 11 Allen (Mass.), 157.
(3) 3 Sumn. 308.
(4) Law Rep. 4 A. & E. 59.

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respectful attention. We are not quite sure whether we correctly appreciate the grounds of the opinion. The learned judge agrees that "an ambassador is personally exempt from the service of all process in a civil cause and from any action which renders such service necessary;" and that "the law as to the privileges of an ambassador applies with equal force to the sovereign." "But," he continues, "it remains to be considered whether there may not be a proceeding in rem against property of the sovereign or ambassador which is free from the objections fatal to the other modes of procedure." He then says "that he would be prepared to hold that proceedings in rem in some cases may be instituted without any violation of international law, though the owner of the res be in the category of persons privileged from personal suit." This is an intimation of an opinion not yet conclusively formed that proceedings in rem are a legal procedure solely against property, and not directly or indirectly against the owner of the property. But then he says that a proceeding in rem cannot be instituted against the property of a sovereign or an ambassador, if the res can in any fair sense be said to be connected with the jus coronæ of the sovereign, or the discharge of the functions of the ambassador. From this one would infer that no personal process can issue against a sovereign or an ambassador; that no process in rem can issue against any property which can in any fair sense be said to be connected with the jus coronæ, but that such process might issue against other property of a sovereign or an ambassador. But then he says that "it is by no means clear that a ship of war to which salvage services have been rendered may not jure gentium be liable to be proceeded against in a Court of Admiralty for the remuneration of such services." Yet such proceedings are undoubtedly by means of process in rem, and it can hardly be denied that a ship of war is property connected with the jus coronæ. "I am disposed to hold," he says, "that in case of salvage or collision the *obligatio* attaches jure gentium upon the ship whatever be her character, public or private." If this includes a ship of war it seems to us difficult to understand how it is not inconsistent with the principle of the judgment in the cases of *The Exchange* (1) and *Briggs* v. *The Light-ships*. (2) If it does not

(1) 7 Cranch, 116. (2) 11 Allen (Mass.), 157.

include a ship of war, the distinction between other processes and the process in rem is not always an answer in the claim of immunity. But then the learned judge expresses an opinion that in the case before him there was a nearer goal at hand, because it was idle to contend that the ships were not trading vessels to all intents and purposes, though, when engaged in their regular employment they carried mail-bags. This seems to intimate that the ships then in question were not public ships at all. We cannot think that this judgment discloses any final opinion of the learned judge, either as to the limits of the nature of the property which is exempt or as to the whole nature of the action in rem with regard to the question under discussion. Having carefully considered the case of *The Charkieh* (1) we are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, viz., that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

This proposition would determine the first question in the present case in favour of the protest, even if an action in rem were held to be a proceeding solely against property, and not a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the Court. But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded. The course of proceeding, undoubtedly, is first to seize the property. It is, undoubtedly, not necessary, in order to enable the Court to proceed further, that the owner should be personally served with any process. In the majority of cases brought under the cognizance of an Admiralty Court no such personal service could be effected. Another course

(1) Law Rep. 4 A. & E. 59.

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was therefore taken from the earliest times. The seizure of the property was made by means of a formality which was as public as could be devised. That formality of necessity gave notice of the suit to the agents of the owner of the property, and so, in substance, to him. Besides which, by the regular course of the Admiralty, the owner was cited or had notice to appear to shew cause why his property should not be liable to answer to the complainant. The owner has a right to appear and shew cause, a right which cannot be denied. It is not necessary, it is true, that the notice or citation should be personally served. But unless it were considered that, either by means of the publicity of the manner of arresting the property or by means of the publicity of the notice or citation, the owner had an opportunity of protecting his property from a final decree by the Court, the judgment in rem of a Court would be manifestly contrary to natural justice. In a claim made in respect of a collision the property is not treated as the delinquent per se. Though the ship has been in collision and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to shew that the liability to compensate must be fixed not merely on the property but also on the owner through the property. If so, the owner is at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the Court. It is no answer to say that if the property be sold after the maritime lien has accrued the property may be seized and sold as against the new owner. This is a severe law, probably arising from the difficulty of otherwise enforcing any remedy in favour of an injured suitor. But the property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the Courts of Admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it as against him who was the owner at the time the lien attached. The new owner has the same public notice of the suit and the same opportunity and right of appearance as the former owner would have had. He is

impleaded in the same way as the former owner would have been. Either is affected in his interests by the judgment of a Court which is bound to give him the means of knowing that it is about to proceed to affect those interests, and that it is bound to hear him if he objects. That is, in our opinion, an impleading. The case of *The Bold Buccleugh* (1) does not decide to the contrary of this. It decides that an action in rem is a different action from one in personam and has a different result. But it does not decide that a Court which seizes and sells a man's property does not assume to make that man subject to its jurisdiction. To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court.

But it is said that the immunity is lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use of her in part for trading purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers, and is substantially in use for national purposes. Both these propositions raise the question of how the ship must be considered to have been employed.

As to the first, the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the

(1) 7 Moo. P. C. 267.

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case of *The Exchange*. (1) Whether the ship is a public ship used for national purposes seems to come within the same rule. But if such an inquiry could properly be instituted it seems clear that in the present case the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandize has been subordinated to the duty of carrying the mails. The ship is not in fact brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents. If the remedy sought by an action in rem against public property is, as we think it is, an indirect mode of exercising the authority of the Court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner. The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity. For all these reasons we are unable to agree with the learned judge, and have come to the conclusion that the judgment must be reversed.

Appeal allowed.

Solicitors for plaintiffs: *Lowless & Co.*
Agents for Treasury Solicitors: *Hare & Fell.*

(1) 7 Cranch, 116.

[IN THE COURT OF APPEAL.]

1880
April 23.

THE CITY OF MANCHESTER. (1878 O. 372.)

Collision—Action by Owners of Cargo—Both Vessels to blame—Costs.

The owners of a cargo laden on board a vessel which had been sunk in a collision with another vessel brought an action of damage against the owners of such other vessel. The judge of the Admiralty Division pronounced that both vessels were to blame for the collision, gave the plaintiffs half their damages from the defendants, and condemned the defendants in the costs of the action. The decision that both vessels were to blame was upheld by the Court of Appeal:—

Held, that, as the plaintiffs had failed on the issue that the vessel carrying the cargo was not to blame, no costs ought to have been given.

THIS was an action by the owners of a cargo carried on board the *Moselle* against the owners of the ship the *City of Manchester*, which had run into and sunk the *Moselle*. The statement of claim alleged that the collision was caused by the negligence of the defendants or of their servants on board the *City of Manchester*, and was not caused or contributed to by the negligence of any of those on board the *Moselle*. The defendants, by their statement of defence, denied these allegations and alleged that the collision was occasioned by the negligent and improper navigation of the *Moselle*.

Sir R. Phillimore, on the 25th of April, 1879, pronounced judgment, finding both vessels to blame, and ordered the owners of the *City of Manchester* to pay the plaintiffs half their damages. On the 20th of May a supplemental order was made, giving the plaintiffs their costs of the action. (1)

The defendants appealed from the judgment and the supplemental order. The plaintiffs gave notice that they should contend that the *City of Manchester* alone was to blame, and that the defendants might be condemned in the whole damage.

Butt, Q.C., and *E. C. Clarkson*, for the defendants.
Phillimore, and *Stubbs*, for the plaintiffs.

THE COURT (James, Baggallay, and Bramwell, L.JJ.) agreed with the Court below in holding that both vessels were to blame.

(1) 5 P. D. 3.

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Butt, Q.C., for the defendants, on the order as to costs. It is settled that as regards damages the same principles are applied whether the plaintiff is owner of the ship or of the cargo, and the same rule ought to hold as to costs. Now in the case of an action between the owners of two vessels as to a collision, if both vessels are to blame, neither party gets costs, and the same rule ought to be followed in an action by the owner of the cargo on board one of them. If the plaintiffs cannot get the whole of the damages from the defendants, why should they get the whole costs? The plaintiffs' case partially fails; they come for the whole damages and get only half; they should bear the costs of the part of their case which fails.

Phillimore, contrà. This is an appeal for costs, and will not lie.

[JAMES, L.J. Where costs are given with regard to the conduct of the parties there is no appeal; but where a general rule is laid down and costs given according to it an appeal will lie.]

This is a separate interlocutory order, and ought to have been appealed from within twenty-one days.

[JAMES, L.J. It must be treated as part of the decree, otherwise there was no jurisdiction to make it.]

Then, on the merits, the case is this: a man sues for 1000*l.*, the defendant insists that nothing is due, and the plaintiff recovers 500*l.*, can he be deprived of costs?

[BRAMWELL, L.J. If he sued in respect of two causes of action which are severable, and succeeded on one, but failed on the other, he could not get full costs.]

This is hardly that case, for if the owner of a cargo sues a shipowner, and the shipowner is to blame, the plaintiff must recover something, and what he is to recover is a mere question of quantities. The case of *The Milan* (1) was carefully considered and is a leading authority, and the Court will not readily depart from what was done in that case. The Judicature Act, 1873, s. 25, sub-s. 9, provides that in cases of collision where both vessels are in fault the Admiralty rule shall be followed.

[JAMES, L.J. That enactment was only intended to exclude the Common Law rule as to contributory negligence.]

The Consett (2) is in the plaintiffs' favour.

(1) Lush. 388. (2) 5 P. D. 52.

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JAMES, L.J. The order as to costs which is under appeal can only be sustained on the ground of its being part of the decree, for if the case had been disposed of by a final judgment the Court would have had no jurisdiction to make a subsequent order. There is, therefore, no ground for the objection that this is an interlocutory order which must be appealed from within twenty-one days. The learned judge in the Court below did not deal with the costs in this case as being within his judicial discretion, but as being subject to a universal rule, that where in a case of collision the owners of the cargo on board one vessel recover damages against the owner of the other vessel they are entitled to full costs, although in consequence of the vessel by which the cargo was carried being to blame the plaintiffs only recover half the damages sustained. I cannot agree with this as a general rule, and I think that such a rule would tend to encourage unnecessary litigation. The owners of the cargo here embarked in a litigation in which they asserted that the defendants were to blame, and that the ship carrying the cargo was free from blame. There were, therefore, two issues; whether the defendants were to blame and whether the carrying ship was to blame. And it appears probable that the greater part of the costs was occasioned by the contention that the carrying ship was not to blame, in which contention the plaintiffs failed. The strict course then would be to give the plaintiffs the costs of the issue on which they succeeded, and to make them pay the costs of the issue on which they failed, but, to avoid the expense of such apportionment, the right course will be to discharge the order so that the plaintiffs will get no costs in the Court below. The appellants will pay the costs of the appeal, except so far as they have been increased by the cross appeal.

BAGGALLAY, L.J. The judge of the Court below has not treated this as a case of discretion as to costs, but has gone upon a general rule which he considered to be laid down in the case of *The Milan*. (1) I am of opinion, therefore, that an appeal lies. As to the costs of this particular action, if I were called upon to deal with them as a matter of discretion, I should say that justice

(1) Lush. 388.

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requires that costs should not be given to either party. At the same time I do not say that in every case the owner of the cargo is in the same position as the owner of the carrying ship. It might be just to say that in the present case the plaintiffs should have the costs of the action, except so far as they have been increased by the claim on which they fail, and that they should pay the costs occasioned by that claim. But this substantially would lead to the same result.

BRAMWELL, L.J. I cannot consider it right that because the owner of the cargo recovers something he should therefore receive the whole of his costs without regard to his having failed in a part of his contentions. Suppose the owners of the *City of Manchester* had admitted that they were to blame, but denied that the other ship was free from blame, and had tendered half the damages, if the action had gone on the plaintiffs ought to have paid the whole costs upon its being decided that the other ship was also to blame. In a recent case, where a plaintiff recovered only nominal damages, he was ordered to pay the whole costs.

Appeal allowed.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Gellatly, Son, & Warton.*

June 8.

THE AMPTHILL. (1880 S. 0639.)

Co-ownership—Receiver—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Discretion.*

The Court will appoint a receiver in a co-ownership suit where circumstances exist which in the opinion of the Court render such a course just and convenient.

THIS was a co-ownership action instituted on behalf of the owner of a moiety of the barque *Ampthill* against the *Ampthill* and against the owner of the remaining moiety of that vessel.

The indorsement on the writ stated that the plaintiff claimed the appointment of a receiver to collect general average contributions due to the owner of the said barque, and the general and particular average due under certain policies of insurance thereon, and also a settlement of accounts between the plaintiff and the defendant and contribution by the defendant to the outstanding

debts and liabilities of the barque, and a settlement of disputes in respect of the employment thereof, and a sale of the defendant's shares in the said barque to provide for the contribution aforesaid.

A motion was made on behalf of the plaintiff, that the plaintiff should be appointed receiver without remuneration. In support of the motion an affidavit was filed which contained statements to the effect that the defendant had acted as managing owner of the *Ampthill* ever since the plaintiff had purchased his interest in the vessel; that in 1879 the vessel being in want of necessary repairs the money to pay for such repairs was borrowed from bankers on the security of a bill of exchange drawn by the defendant on and accepted by the plaintiff, and of the deposit of certain title-deeds of the plaintiff; that the bill of exchange had been dishonoured, and was still unpaid, and that the plaintiff was liable to the bankers for the whole amount of the bill. The affidavit also stated that a sum of about 223*l.* for general average contribution in respect of sea damage sustained by the *Ampthill* was due to her owners, and that there were also due to her owners certain sums for average contributions payable by insurance associations in which the *Ampthill* had been insured.

E. C. Clarkson, for the plaintiff. The Court ought to exercise the power of appointing a receiver recently conferred on it by the 25th section of the Judicature Act, 1873. If the Court thinks the plaintiff ought not to be appointed receiver he is willing to consent to the appointment of any person the Court may think fit to appoint.

G. Bruce, for the defendant. It is quite unusual to appoint a receiver in cases of this kind, and the only result of the appointment of a receiver will be to complicate the proceedings. Every legitimate end will be answered if the Court makes the usual decree for a sale of the ship and directs the accounts to be taken by the registrar. No charge has been made against the conduct of the defendant as managing owner, and as managing owner he has all the powers of a receiver.

E. C. Clarkson, in reply.

SIR ROBERT PHILLIMORE. The only question I have to consider is whether the present case is a proper one for the

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exercise of the power which the Court now undoubtedly possesses of appointing a receiver under the 25th section of the Judicature Act, 1873, and it seems to me that where an action of co-ownership is brought by the owner of one moiety of a vessel against the owner of the other moiety, such a case is one where the appointment of a receiver would be both just and convenient. The course I shall take is this, I shall appoint an independent person who, as receiver, will collect all sums due to the owners of the *Ampthill*, and pay whatever he may collect into the registry. His duties will be the ordinary duties of a receiver, and he must apply to the Court if any difficulty should arise. The registrar will fix the amount of security to be given by the receiver. (1)

Solicitors for plaintiff: *T. Cooper & Co.*
Solicitors for defendant: *Stokes & Co.*

(1) The following is the order which was drawn up:—

June 8. The judge having heard counsel on both sides appointed John Hedley, of Blyth, in the county of Northumberland, shipowner, upon his first giving security to the satisfaction of the registrar, to receive, collect, and get in from the owners or underwriters of the late cargo of the barque *Ampthill*, and from the underwriters on the said barque and her freight, all outstanding debts and liabilities for general average, contribution, freight, or claims for general and particular average on policies of insurance effected on the said barque or her freight or cargo and due to the owners of the said barque, and all other moneys, if any due or owing to the joint owners of the said barque from any person whatsoever, and ordered that the said receiver should pass his accounts every three months, and pay over the balance into the Bank of England to the credit of this action, with liability to apply to the Court if necessary for instructions from time to time.

THE HJEMMETT. (1880 O. 75.)

1880
May 4.

Towage—Jurisdiction of County Court having Admiralty Jurisdiction—County Courts Admiralty Jurisdiction Act, 1868, 31 & 32 *Vict. c.* 71, *s.* 3.

A tug having entered into a contract to tow a ship from A. to B. for a specified sum, the ship, during the performance of the agreed towage, was injured by collision, and the tug was detained nearly three days in attendance on the ship. In an action of towage instituted by the owner of the tug in a county court, and transferred to this Court, this Court held that it had no jurisdiction to award, in addition to the sum agreed to be paid for towage, any remuneration for the delay.

THIS was an action of towage instituted in the City of London Court, on behalf of the owners of the steam-tug *Vivid* against the foreign barque *Hjemmett*. The suit was transferred to this Court under the 6th section of the County Courts Admiralty Jurisdiction Act, 1868.

The following particulars of the plaintiff's claim in the action were furnished in pursuance of an order of this Court of the 26th of February last:—

The plaintiffs entered into an agreement on or about the 26th of December, 1879, to tow the barque *Hjemmett* from Sea Reach to London for the sum of 13*l*. During the towage the *Hjemmett* collided with a steamer. The *Vivid* arrived at Gravesend at 6.30 of the 26th of December with the *Hjemmett* in tow, and would have proceeded to London in pursuance of the agreement. The captain of the *Hjemmett* declined however to allow the plaintiffs to proceed with the towage of the vessel to London until he had cleared away the wreck and part of the damage the *Hjemmett* had sustained from colliding with the steamer. The master of the *Hjemmett* accordingly brought up at Gravesend for the purpose, as he stated, of clearing the wreckage away, and detained the plaintiff's tug *Vivid* in attendance on the ship from 6.30 P.M. of the 26th of December, 1879, until 9 A.M. of the 29th of December, 1879.

The plaintiffs, in addition to the sum of 13*l*., the agreed amount of towage, claim from the defendants such reasonable sum for compensation as the Court may award for the detention of their tug from 6.30 P.M. of the said 26th of December, 1879. The plaintiffs estimate this detention at the sum of 18*l*., being three days, and detention or demurrage at the rate of 6*l*. per day, being the usual rate of demurrage for a tug of the description of the *Vivid*, and thus claim the said sum of 18*l*. in addition to the said sum of 13*l*., the agreed amount of towage.

The owners of the *Hjemmett* appeared as defendants, and tendered 13*l*.

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May 4. The action came on to be heard before the judge in Court. No pleadings were delivered, and no witnesses were called either on behalf of the plaintiffs or of the defendants. The statement of facts contained in the plaintiff's particulars were admitted, except the statement therein contained to the effect that the master of the *Hjemmett* had detained the *Vivid*. With respect to the detention of the *Vivid* at Gravesend, it was however admitted that the *Vivid* had remained there in attendance on the *Hjemmett* for the time specified in the particulars. It was also admitted that the *Vivid* had afterwards, on the 29th of December, taken the *Hjemmett* in tow at Gravesend, and had ultimately towed her to London.

E. C. Clarkson, for the plaintiffs. The contract made by the owners of the *Vivid* was to tow the *Hjemmett* direct from Sea Reach to London, and it must be taken to have been an implied term of this contract than any extra service which the *Vivid* might render during the towage should be compensated for by an additional towage remuneration. By remaining for three days in attendance on the *Hjemmett* at Gravesend the *Vivid* did render such an extra service, and her owners are entitled to receive an equitable compensation in respect thereof.

Phillimore, for the defendants. The owners of the *Vivid* have done no more than they contracted to do. They contracted that the *Vivid* should tow the *Hjemmett* from Sea Reach to London for 13*l.*, and the contract has been performed. If it had been the intention of the owners of the *Vivid* to claim for detention during the towage they ought to have made an express stipulation to that effect.

E. C. Clarkson, in reply.

SIR ROBERT PHILLIMORE. I wish it to be understood that in deciding this case I am not expressing any opinion as to what decision the Court might have arrived at, if the present action had been an action of salvage to recover salvage remuneration for salvage services arising out of the performance of a towage contract. The questions which might then have to be considered would be two, first, whether there having been a valid agreement

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to take a vessel in tow from one place to another, the fact of the ship in tow having been delayed from accident releases the tug from her contract. This question, however, in the circumstances of this case does not arise, as the *Vivid* admittedly fulfilled her contract and took the *Hjemmett* from Sea Reach to London. The second question, and the only question which arises in the present case is, whether such a delay as occurred in the present case renders it necessary that the tug should be paid an additional remuneration beyond the sum agreed to be paid for towage. Now the contention on behalf of the tug is, that owing to the *Hjemmett* having been delayed at Gravesend, a separate service beyond the original towage contract, or a sort of subsidiary service, has been performed by the plaintiffs, and that some remuneration in respect of that service should be awarded in this action. I do not, however, think that I have the power in an action of towage to make an award in respect of such a service, and I must therefore dismiss so much of the claim of the plaintiffs as claims any remuneration beyond the sum of 13*l.* The tender of 13*l.* must be upheld, and I must condemn the plaintiffs in all the costs of the action incurred since the tender was made.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Waddilove & Nutt.*

THE CONSETT. (1877 R. 376.)

June 17.

Collision—Measure of Damage—Loss of Charterparty—Costs of Reference.

The vessel *C.*, which was proceeding in ballast to Montreal to load a cargo of grain for the United Kingdom pursuant to charterparty, was injured by collision with another vessel, and compelled to put into port to repair. The repairs necessarily occupied so long a time that it was not reasonably possible for the *C.* to have arrived at Montreal in time to fulfil her charter before the navigation of the St. Lawrence was stopped by ice for the winter. In these circumstances the owners of the *C* abandoned the charter, and it was found that they acted prudently in so doing:—

Held, that the loss arising from the abandonment of the charter was a loss caused by the collision.

THIS was an action of damage instituted on behalf of the owners, master, and crew of the ship *Jessore* and the owners of the cargo

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of the *Jessore*, against the steamship *Consett* for the damages arising out of a collision between the two vessels on the 10th of October, 1877, about 145 miles to the north-westward of Scilly.

The owners of the *Consett* defended the action, and delivered with their statement of defence a counter-claim, in which they claimed damages arising out of the collision.

On the 25th of January, 1878, the action was heard, and the Court pronounced that both vessels were to blame for the collision, and referred the question of damages to the registrar and merchants. The registrar reported that a moiety of the loss or damage sustained by the plaintiffs amounted to the sum of 27,165*l.* 12*s.* 5*d.*, together with interest, and on the 25th of February, 1880, the Court of Appeal ordered that the defendants, the owners of the *Consett*, should pay the costs of and incident to the reference of the claim of the owners of the cargo. (1) The counter-claim of the owners of the *Consett*, amounting to 2523*l.* 8*s.* 9*d*, was filed in the registry, and on the 15th of January in this year, the registrar, after hearing evidence, made a report, reporting that a moiety of the loss of damage sustained by the defendants, the owners of the *Consett*, in consequence of the collision, amounted to the sum of 1493*l.* 4*s.*, together with interest thereon. The following is a copy of the material portions of such report:—

I find that a moiety of the loss or damage sustained by the defendants amounts to the sum of 1493*l.* 4*s.*, together with interest thereon as stated in the schedule hereto annexed.

The principal question disputed in this case was whether the claimants were entitled to claim for loss of a beneficial charter or only for demurrage, at the ordinary rate during the detention of the ship consequent on the collision, and on this point I have been asked by the counsel for the plaintiffs to make a special report.

In this suit, which arose out of a collision on the 10th of October, 1877, between the sailing ship *Jessore* and the screw steamer *Consett*, both vessels were found to blame. The plaintiffs' vessel *Jessore* was sunk, and the damages sustained by them in consequence have been previously assessed. The claim now investigated is on behalf of the defendants' steamship *Consett* of 1727 tons gross and 1105 tons net register, and 170 horse-power, which sustained certain damages and put into Queenstown for repairs. At the time of the collision the *Consett* was proceeding in ballast on a voyage from Antwerp to Montreal to load

(1) See 5 P. D. 52, 77.

a cargo of grain for the United Kingdom under a charter dated the 27th of September, 1877, negotiated by Messrs. Hamilton, Fraser, & Co., brokers, on behalf of Messrs. Ross, Smith, & Co., of Liverpool. The freight was to be at the rate of 8*s.* 9*d.* per quarter if the ship had to call for orders on the homeward voyage at either Queenstown, Falmouth, or Plymouth, and at the rate of 8*s.* 3*d.* per quarter if ordered from her port of loading direct to her port of discharge. She had left Antwerp on the 8th of October, and between 3 and 4 A.M. of the 10th came into collision with the *Jessore*, after which she made for Queenstown, which port she reached in the morning of the 11th, and was hauled into dry dock for survey and repairs in the afternoon of the same day. On hearing by telegram of the accident the owners forthwith sent their Marine Superintendent Captain McNabb to Queenstown with instructions to superintend the repairs and to urge their completion with the greatest possible despatch, and we are satisfied that every exertion was used by Captain McNabb as well as by the vessel's agent at Queenstown (Messrs. Harvey & Co.) to attain that end, and we are satisfied that as much expedition as could be expected at Queenstown was used, and that no unreasonable delay took place.

It had been anticipated at first that the repairs might be completed in a much shorter time than they ultimately occupied, but at the end of a fortnight it appeared that the ship could not be ready to proceed on her voyage on any day in the month of October.

From the first the charterers on hearing of the collision were very desirous that the charter should be abandoned, on the ground that the ship could not be repaired in time to make the chartered voyage that autumn, as the river St. Lawrence is rendered unnavigable by ice every winter for some months, and they constantly and strongly represented to Messrs. Watts, Milburn, & Co., the owners of the *Consett*, how unjust and injurious it would be to them, the charterers, if from failure of the *Consett* to arrive in time it should become necessary to warehouse through the winter the cargo destined for her. On the other hand, Messrs. Watts, Milburn, & Co. were very anxious to fulfil the charter, as it promised to be a very profitable one, and they only and very reluctantly ultimately acquiesced in its abandonment when it became apparent that the ship could not resume her voyage before the 1st of November. It appears that the usual time up to which ships can leave Montreal is the 25th of November, but in some seasons the winter sets in earlier, and only two years previously, in 1875, Messrs. Watts, Milburn, & Co. had had painful experience of that fact by two of their ships being caught by the ice on their homeward voyage from Montreal on or before the 23rd of November and being frozen up until the spring. An average passage for such a steamship as the *Consett* from Queenstown to Montreal would have been fifteen or sixteen days; and as fourteen running days, Sundays excepted, [virtually, therefore sixteen days] were allowed by the charter to the charterers for loading and unloading, the risk of the *Consett* being unable to reach Montreal and load her cargo and get clear of the St. Lawrence before it should be rendered unnavigable by ice was, in our opinion, very considerable, and one which it was right and prudent not to incur. Under all the circumstances we come to the conclusion that the owners acted prudently, and were justified in acquiescing in the abandonment of the Montreal charter and in avoiding the risk of sending his ship to the port so late in the season. A further question then arises whether

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the loss occasioned by the abandonment of the beneficial charter to Montreal, and the substituted employment of the ship in a less profitable manner, is one for which the owners of the *Consett* can recover; and it was strongly contended by counsel for the plaintiffs that it is not, and that in fact such damage is too remote even on the assumption that the owner acted with proper prudence in not persisting in the voyage. It has appeared to me, however, that the case comes within the principle laid down by this Court in *The Star of India* (1), and that such loss must be allowed as damages. We have therefore proceeded to estimate as accurately as we could what that loss amounted to. In the first place we have calculated that if the voyage from Antwerp to Montreal and back to the United Kingdom had been prosecuted without interruption or hindrance it might have been performed in fifty days, and that the total gross freight under the Montreal charter at 8*s.* 3*d.* per quarter on 10,500 quarters would amount to 4331*l.* 5*s.*, but from that freight deductions should be made for further expenses beyond those actually incurred which would have been incurred in earning it, including an allowance for wear and tear. These expenses would have been in respect of coals and engine stores that would have been consumed, insurances, commission on freight, disbursements both at Montreal and the port of discharge, wages and provisions of master and crew, besides other minor charges, the total amounting to 2110*l.*, which deducted from 4331*l.* 5*s.*, would have left a net freight earned in fifty days of 2221*l.* 5*s.*

As already stated, the collision occurred early in the morning of the 10th of October. The ship did not come out of dock after repairs until the 1st of November, and was then detained until the following day for the purpose of taking in some extra coals required for the longer voyage on which she was then about to proceed. The total detention was therefore about twenty-one days, at the end of which period the ship was at the disposal of the owners to employ as they thought fit. And we consider, in order to fix the amount of loss sustained by the abandonment of the Montreal charter and the subsequent employment of the ship in a less profitable manner, we should allow the net earnings under that charter ascertained as above, and then deduct from that sum the net rate of earnings which we assume such a ship would ordinarily secure to her owner during the remaining twenty-six days when she was restored to their control. This we take at 25*l.* a day, which is equal to about 3½*d.* per ton on her gross tonnage, and gives for twenty-six days 650*l.*, which deducted from 2221*l.* 5*s.*, leaves 1571*l.* 5*s.* as the measure of loss arising from the frustration of her intended voyage to Montreal. The claimants have suggested that the comparison should be made with the result of the actual employment of the ship on the substituted voyage to New Orleans. I am of opinion, however, that the measure we have adopted is a better and more correct one. If the comparison were made with the result of the particular voyage which the owners may choose to select, the necessity would be imposed upon us of inquiring into the prudence and propriety of the selection, and of investigating the accounts of a voyage which might, as in this instance, occupy a much longer time than the voyage which has been abandoned, and might be greatly affected by the occurrence of special perils of the sea, possibly leaving no net earnings at all.

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(1) 1 P. D. 466.

The following is a copy of the schedule referred to in the above report:—

	CLAIMED. £ s. d.	ALLOWED. £ s. d.
1. Pilotage of the steamship *Consett* into Cork and out to sea	10 15 5	10 15 5
2. Pilot, shifting and docking steamer	1 0 0	1 0 0
3. Towage from sea to passage and docking	9 10 0	9 10 0
4. Sundry attendances on steamer, running lines to dockyard, &c.	1 13 6	1 13 6
5. Telegrams	2 6 3	
6. G. N. Harvey & Sons, as per their account	7 9 0	4 15 4
7. Photographs	7 1 6	
8. Shipping office fees	3 5 0	
9. Water	3 10 0	
10. G. B. Dawson, as per his account	4 8 6	
11. Messrs. Norton & Wright, surveyors	4 4 0	4 4 0
12. United States Consulate fees	1 7 0	1 7 0
13. Copy depositions	0 15 0	
14. Survey fees	12 12 0	12 12 0
15. T. Miller, for rope, &c.	13 0 7	4 3 9
16. New ends to windlass	15 0 0	15 0 0
17. Expenses of agent and Captain McNabb	6 11 6	40 0 0
18. Captain McNabb, for expenses and services	49 13 3	
19. Telegrams, postages, &c.	10 0 0	8 8 0
20. Agency commission, &c.	85 18 11	15 15 0
21. The Cork Harbour Dock and Warehouse Company, for repairs, &c.	1,425 0 0	1,285 19 0
22. Demurrage of the steamship *Consett*, of 1727$\frac{12}{100}$ tons gross, from 10th October to 3rd November, 1877, 25 days at 6*d.* per ton per day	1,079 9 1	1,571 5 0
23. Loss through change of voyage of the *Consett*, necessitated by the collision	2,292 7 1	
Half	£5,046 17 7	2,986 8 0
	£2,523 8 9	1,493 4 0

With interest at 4 per cent. per annum from the 1st of December, 1877, until paid.

From so much of the report as related to the allowance by the registrar of loss sustained by the owners of the *Consett* by reason of the cancellation of the charterparty of the 27th of September, 1877, the plaintiffs appealed to the Court. They brought in a petition in objection, the material part of which was as follows:—

1.—The plaintiffs object to the said report in so far as the same allows the claim of the defendants under their counter-claim in respect of alleged loss to the

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defendants by reason of their cancellation by agreement of the charter-party of the *Consett*, dated Liverpool, the 27th of September, 1877, and the procurement in substitution for the same of another charterparty to New Orleans, dated the 29th of October, 1877.

2.—The collision in question between the *Jessore* and the *Consett* in respect of which both vessels have been found to blame, took place on the 10th of October, 1877, about 145 miles to the north-westward of Scilly.

3.—The *Consett* after the said collision, put into Queenstown where she was repaired, and the said cancellation of her charterparty took place on the 26th day of October, 1877, while she was at Queenstown for the purpose of such repairs.

4.—The learned registrar has found in his report, that it was reasonable under the circumstances, for the defendants the owners of the *Consett*, to effect the said cancellation of the *Consett's* charterparty and to procure the said other charterparty in substitution, and has allowed as damages the net profits which the *Consett* would have earned on the Montreal voyage, subject to a deduction of 650*l.*, being the computed net rate of earnings of the *Consett* during twenty-six days when the vessel was under the control of the owners.

5.—The plaintiffs object to the said finding in the said report, on grounds partly of fact and partly of law. As regards matters of fact they submit as follows:—

[The objections as regards matters of fact it is not necessary to set out.]

As regards law the plaintiffs submit as follows:—

14.—The registrar was wrong in taking into consideration the fact *that there were sixteen lay days stipulated in the charterparty* and that the *Consett* might have been detained at Montreal during that period, as it was proved that the cargo was ready for loading and the charterers were desirous of cancelling the charter and chartering another vessel, because their cargo was waiting at Montreal for shipment.

15.—The registrar was wrong in awarding damages consequent on the loss sustained by reason of the cancellation of the charterparty, which cancellation was the voluntary act of the defendants and the charterers, and the event proved that the vessel might have performed the charterparty without any danger or risk of injury to herself or her cargo, and might and would have earned the chartered freight.

16.—The circumstance that the ship-owners and the charterers were influenced by prudential motives in cancelling the charterparty does not throw upon the plaintiffs the loss sustained by the owners of the *Consett*, by reason of such cancellation.

17.—The damages allowed by the registrar as consequent on the cancellation of the *Consett's* charterparty, were not the proximate and natural result of the collision, and are too remote, and are not recoverable from the plaintiffs.

18.—The registrar was wrong in holding that the case comes within the principle of the *Star of India*. (1) In that case the charterers cancelled the charterparty in accordance with the stipulation giving them the power to do so.

(1) 1 P. D. 466.

June 7. The petition on objection was heard. 1880

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Butt, Q.C., and *Myburgh*, for the plaintiffs in support of the petition.

Cohen, Q.C., and *Phillimore*, on behalf of the defendants, contrà.

SIR ROBERT PHILLIMORE. This is an appeal from the registrar assisted by merchants. The whole history of the case is very clearly set forth in the report. The appeal is not made upon the report generally, but only on one portion of it; and the question before me is, whether the loss of a beneficial charter is to be considered in estimating the damages which the counter-claimants sustained in this case. The collision took place on the 10th of October, 1877, and the *Jessore* sank. The *Consett*, at the time of the collision, was under charterparty, whereby she was to proceed in ballast to Montreal to load a cargo of grain, and the freight was to be at the rate of 8*s.* 9*d.* per quarter if the ship had to call for orders on the homeward voyage at either Queenstown, Falmouth, or Plymouth; and at the rate of 8*s.* 3*d.* per quarter if ordered direct from her port of loading to her port of discharge. The vessel left Antwerp on the 8th of October between 3 and 4 o'clock in the morning, and came into collision with the *Jessore;* on the 11th she came to Queenstown, where she remained. Great hopes were entertained that she would be able to proceed on her voyage in the middle of October, but as the repairs were going on it was found that she could not be got ready until the end of a fortnight, and that she would not be able to proceed before the 1st of November. It was calculated that she would not be able to arrive at Montreal, and be able to take a fresh cargo before the 25th of November. And it appears from the evidence before the registrar, which it is not necessary to go into at length, as it has been fully discussed by counsel on both sides, that owing to the ice in the St. Lawrence, the usual time in the autumn up to which ships can leave Montreal, is the 25th of November, but that there is a risk that ships leaving even on that date will be stopped by the ice. The owners of the *Consett* found themselves, they contend, in this position, that they were obliged to give up and abandon the charter. It was admitted that it was a profitable

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charter to them. It is not disputed by the appellants in this case that demurrage or damages for detention, might be awarded for the whole time the repairs were being done; but it has been said that the loss of a beneficial charter in this case, is not a claim that can be dealt with under the head of damages; and it has been very fairly admitted that if the damage claimed under this head or a legitimate portion of such damages can be recovered, then the figures mentioned in the report are correct. The questions then arise was it reasonably possible for the *Consett* to have performed her outward voyage under the charter? and if it was reasonably possible for her to have performed such voyage, had she any right to abandon her charter and oblige the appellants to pay the loss sustained? It is not contended that if it was reasonably possible for her to have performed her charter, the damages for the loss of the charter could rightly be claimed.

Now, the registrar and merchants have come to the conclusion that the risk of the *Consett* being unable to reach Montreal so as to sail on her homeward voyage before the St. Lawrence had been rendered unnavigable by ice, was such as it was not prudent to incur, and that the profit of a beneficial charterparty being lost was damage for which the appellants were liable. It is really a question of evidence whether it has been on the whole established that it was reasonably possible for the *Consett* to have performed the charter. I am of opinion that the evidence has established that it was not reasonably possible for her to do so; and if this proposition is established, the consequence must follow that the loss which the defendants have sustained by reason of the loss of a beneficial charter in this case must be included in the category of damages. I must, therefore, confirm the report and dismiss the appeal with costs.

June 17. *Phillimore*, for the defendants, moved the judge in court, to condemn the plaintiffs in the costs of and incident to the reference of the defendant's counter-claim to the registrar and merchants. Most of the witnesses at the reference, were called for the purpose of giving evidence as to the consequential damage sustained by the owners of the *Consett*, and the defendants succeeded on the legal question which arose in consequence

of the evidence of these witnesses not only both before the registrar but on appeal to this Court. This is not a case in which the ordinary rule of condemning in costs claimants who have had a third of their claim struck off is applicable. *The Elina.* (1)

Myburgh, for the plaintiffs. Nearly one half the amount of the defendants' claim in this case was disallowed by the registrar; and it is clearly in accordance with the ordinary rule that the defendants should be condemned in the costs of the reference. The rule is not the less applicable because questions of law have been raised and decided at the reference. *The Empress Eugenie.* (2)

SIR ROBERT PHILLIMORE. I am of opinion that the proper order to make in this case is, that the defendants, the owners of the *Consett*, shall have the costs of proving those items of their claim which are marked 1 to 21 in the schedule appended to the report of the registrar, and that each party shall pay a moiety of the reference fees. As to the residue of the costs of the reference and the costs in the action each party must bear the share of such costs incurred by him. I make this decision in the peculiar circumstances of this case.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Rawle.*
Solicitors for defendants: *T. Cooper & Co.*

(1) THE ELINA. (1877 H. 164.) April 13, 1880.

This was a case of damage to a cargo of maize, caused by the heating of a portion of the cargo consequent upon delay arising from the master of the *Elina* remaining at Queenstown, his port of call, for some days after he had received orders to sail for Newcastle-upon-Tyne. A portion of the cargo it was admitted had been damaged by the perils of the seas, and it was matter of impossibility to ascertain with accuracy what extent of damage was caused by the delay at Queenstown.

The amount of damage claimed was 1056*l.* 16*s.* 6*d.*, and the amount allowed by the registrar and merchants on the reference was 600*l.* The Court gave the plaintiffs the costs of the reference.

Butt, Q.C., and *G. Bruce*, for the plaintiffs.
Milward, Q.C., and *E. C. Clarkson*, for the defendants.

Solicitor for plaintiffs: *S. R. Hoyle.*
Solicitor for defendants: *T. Cooper.*

(2) Lush. 138.

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June 19.

THE MARGARET. (1879 H. 310.)

Collision—Infringement of Thames Bye-laws.

A dumb barge, by the negligent navigation of those in charge of her, was suffered to come into contact with a schooner moored to a mooring buoy in the river Thames. The schooner had her anchor hanging over her bow with the stock above the water, contrary to the Thames bye-laws. The anchor made a hole in the barge and caused damage to her cargo. But for the improper position of the anchor of the schooner, neither the barge nor her cargo would have received any damage :—

Held, that the owners of the barge were not entitled to maintain an action of damage against the schooner.

THIS was an action of damage instituted on behalf of the owners of the dumb barge *E Wo* against the schooner *Margaret*. The *Margaret* was moored in Blackwall Reach in the river Thames at the time of the collision. The statement of claim stated that the barge was proceeding up Blackwall Reach with a cargo of tea shortly after midnight, and was being navigated by two men who were rowing her, and in order to avoid a steamer, those in the barge proceeded to lay her head in towards the north shore, and after the steamer had passed down the river they commenced to bring the barge out again towards mid-channel, when the riding light of the *Margaret* was seen ahead, and about 200 yards distant.

The 4th paragraph of the statement of claim alleged as follows :—

> Those on board the said barge attempted by rowing to clear the *Margaret*, but the *Margaret* was contrary to the 20th rule of the rules and bye-laws for the navigation of the river Thames, lying with her anchor swinging by the cable perpendicularly from the hawse, with the stock of the said anchor not awash, and the fluke of the said anchor penetrated the starboard side of the said barge and greatly injured the same and caused water to enter the barge and injure the cargo of tea therein.

The owners of the *Margaret* by their statement of defence pleaded, inter alia, that those on board the *E Wo* might by the exercise of ordinary and reasonable care and skill have avoided the collision.

The witnesses called on behalf of the plaintiffs stated there was

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a four-knot tide running, and the starboard quarter of the *E Wo* came in contact with the bow of the *Margaret;* fenders were put over from the *E Wo* to fend off the blow, but the anchor of the *Margaret,* which was hanging from the bow of the *Margaret* with the stock about three feet above the water, made a hole in the *E Wo,* and caused damage to her and her cargo. The witnesses stated that if the anchor of the *Margaret* had not been then hanging as it was the barge would not have received any damage, and that it was the anchor alone that caused the damage.

The rules and bye-laws for the regulation of the navigation of the river Thames were relied on by the plaintiffs. The material articles of these bye-laws are set out in the judgment. No witnesses were called on behalf of the defendants.

Butt, Q.C., and *Bucknill,* for the plaintiffs. The damage arose solely from the anchor of the *Margaret* being in an improper position. No damage would have arisen from the barge coming into contact with the *Margaret* if the anchor had not been where it was. The cause of action is not the collision, but the damage which was caused by the collision, and the evidence of the plaintiffs' witnesses that the whole damage was caused by the position of the anchor of the *Margaret* is not contradicted. In the absence of damage there would be no right of action. The cause of action, therefore, arises entirely from the wrongful act of the *Margaret.* In any event if the *Margaret* was not solely to blame for the damage she at least contributed to the damage, and she cannot be held to be free from blame.

E. C. Clarkson, for the defendants. The anchor in no way caused the collision, the collision arose simply from the negligent navigation of the *E Wo,* and although the position of the anchor may have caused the damage to the barge to be much greater than it otherwise would have been, that does not affect the cause of action. The circumstance that the *Margaret* infringed the bye-laws renders her owners liable to a penalty only, and is not a reason why she should be found to be in fault for the collision: *Sills* v. *Brown* (1), *The Gipsey King.* (2)

Butt, Q.C., in reply.

(1) 9 C. & P. 601. (2) 2 W. Rob. 538; 5 No. Ca. 284; 11 Jur. 357.

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SIR ROBERT PHILLIMORE. In this case the collision took place between twelve and one o'clock in the morning of the 16th of October, in the river Thames. The vessels that came into collision were a dumb barge rowed by two men, going from Victoria Docks to Hay's Wharf with a cargo of tea, and the *Margaret*, a schooner of 216 tons, on a voyage from Neath to London.

The *Margaret* was moored by a chain cable to one of the Thames Conservancy buoys. The *Margaret* was run into by the barge in this case, that there can be no dispute about; but it has been contended that, having regard to the rules and bye-laws for the regulation of the navigation of the river Thames, the damage was caused by the improper position of the anchor of the *Margaret*.

Now, it appears to the Elder Brethren and myself that in this case the *Margaret* was lying at anchor in a proper place, that she was properly moored, that she carried a proper light, which was visible at a considerable distance, that the night was clear and starlight, and that the careless navigation of the barge brought the two vessels into contact.

The 20th bye-law is in these words:—

> No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse, unless the stock shall be awash, except during such time as shall be absolutely necessary for catting or fishing the said anchor or anchors, or during such time as may be absolutely necessary for getting such vessel under way.

It is established in this case that the stock of the anchor was not awash, but was about three feet above the water's edge. This bye-law, therefore, appears to have been infringed, but the penalty for such an infringement is stated in the 72nd article of the same bye-laws, which is as follows:—

> Any person committing any breach of, or in any way infringing any of these bye-laws, shall be liable to a penalty of, and shall forfeit, a sum not exceeding 5*l.*; which said penalty shall be recovered, enforced, and applied according to the provisions of the Thames Conservancy Acts, 1857 and 1864.

It appears to me that a confusion has prevailed in the arguments of the counsel for the barge. The question before the Court to-day is who was guilty of the collision, because without the collision, whatever the condition of the anchor might have been, no damage of course could have been done; and it appears to us

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(the Trinity Masters have no doubt whatever) that the careless navigation of the barge in question brought the two vessels into contact. What are the consequences of this contact? what is the amount of damage caused by the collision? are questions which are not now before me.

In this view of the case I think I am fortified both by the judgment referred to in *The Gipsey King* (1) and by the ruling of the judge in *Sills* v. *Brown* (2); but I think it only fair that I should state my opinion, and not rely entirely on those cases, because it may be said that the circumstances of the cases cited differ, and that the precedents are not strictly applicable. I therefore think it right to state that my own opinion is in concurrence with that expressed by the Elder Brethren, that the collision was caused by the careless navigation of the barge. I do not think it necessary to go at length into the evidence which establishes that the riding light on board the *Margaret* was really visible at a very considerable distance.

I pronounce the barge *E Wo* to be alone to blame for this collision, and I dismiss the action with costs.

Solicitors for plaintiffs: *Cattarns, Jehu, & Hughes.*
Solicitor for defendants: *J. T. Davies.*

THE SINQUASI. (1879 C. 315.)

July 19.

Collision—Compulsory pilotage—Duty of Pilot on board of Ship in tow.

Where a ship in charge of a pilot whose employment is compulsory is being towed by a steam-tug and the steam-tug without waiting for orders from the pilot suddenly adopts a wrong manœuvre, and so causes the ship to come into collision, the owners of the ship are responsible.

Semble, where a pilot is in charge of a ship in tow in a crowded river, it is not necessarily incumbent upon him to direct every movement of the tug.

THIS was an action of damage brought by the Company of Proprietors of the Regent's Canal against the barque *Sinquasi* and her owners.

The statement of claim alleged that in the afternoon on the 4th day of October, 1879, the barque *Sinquasi*, which was going

(1) 2 W. Rob. 538; 5 No. Ca. 284; 11 Jur. 357. (2) 9 C. & P. 601.

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up the river Thames in tow of a steam-tug, ran against and struck the pier of the plaintiffs and did it considerable damage, and that the collision and damage were occasioned by the negligence of the defendants, the owners of the *Sinquasi*, or by the negligence and improper navigation of the *Sinquasi* and her tug or of one of them, and by the neglect of those on board the *Sinquasi* and her tug or one of them, to take proper measures for keeping the *Sinquasi* from running against and damaging the said pier.

The statement of defence alleged in substance as follows:—

1. The *Sinquasi* was proceeding up Limehouse Reach in the river Thames in tow of the steam-tug *Warrior*, and in charge of a duly licensed Trinity pilot, whose employment at the time and place was compulsory by law.

2. The *Sinquasi* had all her sails stowed and the jibboom rigged in.

3. Under these circumstances, whilst the *Sinquasi* and her tug were manœuvring to clear some craft which were in the river nearly opposite the Regent's Canal Pier, the *Sinquasi* came into collision with the said pier head and did some damage.

4. The said collision and the damage consequent thereon were caused solely and exclusively by some neglect or default on the part of the said pilot who was in charge of the *Sinquasi* and her tug at the time of the said collision, and not otherwise.

The pilot who was in charge of the *Sinquasi* was called as a witness on behalf of the plaintiffs. He stated that he was taken on board the *Sinquasi* at Gravesend, and he gave such orders to the tug during the passage up the river as he considered necessary, but he left the tug to alter her course to clear craft so long as she was going right. When the *Sinquasi* was in Limehouse Reach the navigation was intricate. When approaching the Regent's Canal the tug, without any order from him, suddenly ported to pass to the north of a dumb barge and two sailing barges, and pulled the *Sinquasi* in the direction of the pier. The pilot was then obliged to port the helm of the *Sinquasi* to clear the dumb barge, but as soon as he had cleared her he put the helm of the *Sinquasi* to starboard to try and keep her off the pier, but the barque did not answer her starboard helm quickly enough to clear the pier. The pilot stated that if the tug had not ported the tug

and the *Sinquasi* would have gone clear of the barges, and the accident would not have happened. The rest of the evidence, so far as material, appears from the judgment.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiffs. It is clear that the mistake arose from the act of the tug master. He was the servant of the owners of the barque, and the manœuvre which caused the damage was not done under orders from the pilot, and the pilot had not time to counteract the wrong manœuvre.

Myburgh, and *Wood Hill*, for the defendants. It was the duty of the pilot in the intricate navigation of Limehouse Reach to give orders to the tug; he ought not to have left the tug master to take his own course to clear the craft in the river. In point of fact the pilot delegated his authority to the tug master, and the tug master must be taken to have acted with the sanction of the pilot. At all events the pilot should at once have countermanded the manœuvre of the tug: *The Duke of Sussex.* (1)

E. C. Clarkson, in reply.

SIR ROBERT PHILLIMORE. This is a case arising out of a collision which took place between 12 and 1 o'clock in the afternoon on the 4th of October, 1879. The barque *Sinquasi*, the vessel proceeded against in this action, was going up the river Thames in tow of a steam-tug called the *Warrior*, and struck the jetty or pier of the plaintiffs, and did considerable damage. The owners of the *Sinquasi* admit that that vessel came into collision with the pier head of the plaintiffs and did the damage complained of, but they contend that the *Sinquasi* did the damage through the negligence of a Trinity House pilot, whose employment was compulsory by law, and that therefore such pilot was alone to blame for the collision. Now the question mainly turns upon the conduct of the tug towing the *Sinquasi* in porting her helm and going to the north of the dumb barge and two sailing barges which were going up the river. A great deal of argument has been expended upon the fact of whether there was room sufficient for the tug and the *Sinquasi* to have gone between the dumb barge and the sailing barges. It is admitted that if there

(1) 1 No. Ca. 161.

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was sufficient room to pass between the two barges it was the duty of the tug to tow between them; and we are of opinion that there was sufficient room. Upon this point the evidence of Allen, the pilot, was material. He was rowing across the river from north to south, and had a full opportunity of seeing what passed, and he swore positively that there was plenty of room between the barges.

This statement is confirmed by the persons who were on the pier head. It is denied by the witnesses for the defendants, but we have more confidence in the witnesses produced by the plaintiffs. It was therefore a wrong manœuvre on the part of the tug to port; and this was primarily the cause of the collision. It has been said that the pilot delegated his authority not in terms but in conduct to the master of the tug. We are not of that opinion. It is not necessary, in our judgment, that the pilot should be giving orders perpetually for every movement of the helm of the tug. When the tug suddenly ported without the order of the pilot the *Sinquasi* had no option but to follow him. The tug was the servant of the *Sinquasi*, and the *Sinquasi* is responsible for what the tug did. We believe the pilot starboarded as soon as he could after clearing the dumb barge. The *Sinquasi*, having regard to her length, could not recover herself in time to prevent the collision. In the opinion of the Court the *Sinquasi* is to blame for the collision, which was not caused by any default of the pilot.

Solicitors for plaintiffs: *Jenkinson & Olivers.*
Solicitors for defendants: *T. Cooper & Co.*

THE ROSALIE. (1880 S. 0663.)

1880
July 29.

Collision—Regulations for Preventing Collisions at Sea—Arts. 12, 18—*Sailing Vessel hove to on Port Tack.*

A sailing vessel hove to on the port tack is bound to keep out of the way of a crossing vessel under sail close hauled on the starboard tack.

THIS was a case of collision brought by the owners of the fishing dandy *Young Alonzo* against the three-masted schooner *Rosalie.* The collision took place at 11 A.M. in fine clear weather off Plymouth, the wind at the time being from the east a fresh breeze. The *Young Alonzo* was lying hove to on the port tack with her foresail sheet to windward and her tiller about three parts down, and heading about south-east, and she so remained until the collision; and hailed to the *Rosalie* to keep out of her way.

The *Rosalie* was a three-masted schooner, and she was coming up channel close hauled on the starboard tack and heading about N.N.E. She sighted the *Young Alonzo* about a mile off bearing about three points on the port bow. The *Rosalie* kept her course until there was immediate danger of collision, when her helm was put hard down and she came into collision with the starboard side of the *Young Alonzo.*

J. P. Aspinall, and *F. W. Raikes,* for the plaintiffs. The *Rosalie* could easily have kept clear of the *Young Alonzo;* she must have seen that the *Young Alonzo* was hove to, and according to the ordinary practice of navigation, a ship under way should keep clear of a vessel hove to: *The Lake St. Clair.* (1)

E. C. Clarkson, and *Myburgh,* for the defendants. Art. 12 of the Regulations for Preventing Collisions at Sea applies. The *Young Alonzo* had the wind on the port side, and if she had put up her helm and let her foresail draw she could have got out of the way of the *Rosalie.* The *Rosalie* was entitled up to the last moment to suppose that the *Young Alonzo* would have obeyed the regulations, and the *Rosalie* was bound to keep her course: Art. 18; *The James* (2); *The London.* (3)

(1) Nomine *Wilson* v. *The Canada Shipping Co.* 2 App. Cas. 389.

(2) Swa. 60.

(3) 6 No. Ca. 29.

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SIR ROBERT PHILLIMORE. I am of opinion that the 12th Article of the Regulations for Preventing Collisions at Sea applies to this case. That article is in terms as follows:—"When two sailing ships are crossing so as to involve risk of collision, then if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close hauled and the other ship free, in which case the latter ship shall keep out of the way; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward." The *Young Alonzo* had the wind on her port side, and the *Rosalie* had the wind on her starboard side. The *Young Alonzo* ought to have released her tiller. I am of opinion that the *Young Alonzo* is to blame. Then there is the question whether the *Rosalie* is not also to blame. She might have done something in the circumstances to avoid the collision, and ought to have seen the *Young Alonzo* in time. She did nothing. She ought to have starboarded and passed astern of the *Young Alonzo*, whereas she ran on to the starboard side of the *Young Alonzo*. I pronounce both vessels to blame.

Solicitor for plaintiffs: *H. C. Coote.*
Solicitors for defendants: *Ingledew & Ince.*

[IN THE COURT OF APPEAL.]

1880
April 20.

THE GANGES. (1879 H. 107.)

Appeal from Passage Court of Liverpool—Security for Costs—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 25, 26, 27.

An appeal from an order made by the Court of Passage of the Borough of Liverpool in an Admiralty cause is subject to the same rules as an appeal from a County Court in an Admiralty cause.

Security for costs must be given before lodging the instrument of appeal, otherwise the appeal cannot be entertained.

The Forest Queen (Law Rep. 3 A. & E. 299) approved.

THIS was an action for wages brought in the Court of Passage of the Borough of Liverpool. By s. 25 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), it was enacted that on an Order in Council being made, appointing the County Court at Liverpool to have Admiralty jurisdiction, the Court of Passage should have the like jurisdiction, powers and authority, as were conferred by such order on the County Court. An Order in Council had been made, giving an Admiralty jurisdiction to the Liverpool County Court, so that the Passage Court had acquired Admiralty jurisdiction. Judgment in this action was given on the 8th of March, 1879. On the 18th of March, 1879, the plaintiffs gave notice that they had that day lodged an instrument of appeal against the judgment. The defendants on the 22nd of April took out a summons to shew cause why the appeal should not be dismissed with costs as bad in law, by reason of security for the costs of the appeal not having been given, pursuant to the County Courts Admiralty Jurisdiction Act, 1868, s. 26. This summons was heard before the judge, when Sir R. Phillimore made an order dismissing the appeal with costs, giving leave to present a fresh appeal if security for costs was given within ten days in the Court of Passage, and leave to appeal from the present order within the ten days.

The plaintiffs appealed from this order of dismissal.

Phillimore, for the plaintiffs. On the true construction of 31 &

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32 Vict. c. 71, s. 26, the provision as to security for costs only applies to appeals from interlocutory orders, and not from final decrees. Moreover, the 45th section of the Judicature Act, 1873, subjects all appeals from inferior Courts to the practice established by the Judicature Acts, so that such appeals are now regulated by Order LVIII. Rule 19 of that order, introduced by the general orders of December, 1876, merely provides by what Court such appeals shall be heard, but does not affect the applicability of the other provisions of the general orders. The giving security for costs must therefore be regulated by Order LVIII., rule 15, which in fact abolishes the 26th section of 31 & 32 Vict. c. 71: *Garnett* v. *Bradley*. (1) The decision in *The Forest Queen* (2) cannot be upheld. Moreover this is not an appeal from a County Court, but from the Court of Passage, and 31 & 32 Vict. c. 71, s. 25, contains no words to make the provisions as to appeals from County Courts apply to appeals from the Court of Passage. This clause does not assimilate the Passage Court to the County Courts: *Harper* v. *Pole*. (3) Under the Passage Court Orders and Rules of December, 1876, the practice of the Court of Passage is regulated by the Judicature Acts, and the general orders made in pursuance of them.

Aspinall, contrà, was not called upon.

JAMES, L.J. I am of opinion that the plain meaning of 31 & 32 Vict. c. 71, s. 26, is that no appeal shall be brought from a decree or order of a County Court in an Admiralty case, unless security for costs is first given. It has been contended that this condition only applies to interlocutory orders, but I think it hardly possible to express more clearly than has been done that it applies to all appeals. I cannot differ from the decision of the learned judge, which only follows that in *The Forest Queen* (2), a case which has remained unquestioned for ten years. Then it has been contended, that although the 25th section gives the Court of Passage the same Admiralty jurisdiction as the County Court, there is no provision making the enactments as to appeals from the County Courts applicable to that Court. This would leave

(1) 3 App. Cas. 944. (2) Law Rep. 3 A. & E. 299.
(3) Law Rep. 3 Eq. 752.

the jurisdiction of the Court of Passage in such an anomalous position, that it would need very strong words to prevent me from arriving at the conclusion that the whole of the provisions of the Act as to County Courts apply to the Court of Passage, when invested with Admiralty jurisdiction.

BAGGALLAY, L.J. I am of the same opinion.

BRAMWELL, L.J. As regards the argument that the 26th section of the Act is repealed by s. 45 of the Judicature Act, 1873, I think that the latter section contains nothing inconsistent with the former, and does not repeal it, there being no such general words as were relied upon in *Garnett* v. *Bradley*. (1) As regards the argument that the County Courts Admiralty Jurisdiction Act, 1868, contains no provision making appeals from the Court of Passage subject to the same rules as those from County Courts, I am of opinion that the proper construction of the Act is that the Court of Passage takes its Admiralty jurisdiction subject to the same incidents as if it were a County Court.

Appeal dismissed.

Solicitors for plaintiffs: *Speechly, Mumford, & Co.*
Solicitor for defendants: *H. C. Coote.*

(1) 3 App Cas. 944.

1880
May 11.

THE ST. LAWRENCE. (1880 M. 18 Liv.)

Necessaries—Money advanced to pay Dock Dues—Priority over Claim of Bottomry Bondholder.

The plaintiffs, in an action of necessaries against a foreign ship, having at the request of the master advanced money to pay dock dues for the ship at the port of discharge, were held to be entitled to have the amount they had so advanced paid out of the proceeds of the ship in priority to the claim of a bottomry bondholder who had advanced money on bottomry at the port of loading.

THIS was an action of necessaries instituted on behalf of Messrs. Moos & Co., shipbrokers of Liverpool, against the Norwegian barque *St. Lawrence,* and her freight, to recover certain sums of money advanced to pay for necessaries supplied to the *St. Lawrence* on her arrival at Liverpool in February last on a voyage from Baltimore. At the time of the institution of the suit, the *St. Lawrence* was already under the arrest of the Court, in two actions of bottomry instituted on behalf of the holders of two bottomry bonds on ship, cargo, and freight, which had been given for securing the principal sums of 1521*l.* 5*s.* 7*d.*, and 57*l.* 6*s.* 1*d.*, advanced in Baltimore previously to the commencement of the voyage, and in an action of wages instituted on behalf of her master and certain of her crew. No appearance having been entered for her owners, the proceedings against her in all three actions were carried on by default.

On the 7th of April last a statement of claim, which contained, inter alia, the following allegations, was delivered in the present action:—

The *St. Lawrence* arrived in Liverpool from Baltimore in February last.

Upon the arrival of the said vessel at Liverpool her crew became and were entitled to be paid their wages, and to receive their discharge, and there was a sum of money due to them for wages.

The master of the said vessel had no moneys wherewith to pay the said wages, and being unable to obtain any, and being apprehensive that the said vessel would be arrested, applied to the plaintiffs to advance the necessary sums to pay the crew their wages, in order to avoid legal proceedings being taken against the said vessel, and the plaintiffs therefore advanced to the master of the said vessel the sum of 19*l.*, for the purpose of its being paid, and the same was paid to the crew of the said vessel for their wages, which sum is still due and unpaid to the plaintiffs.

Under the circumstances aforesaid the plaintiffs also, at the request and by the direction of the master of the said vessel, paid the sum of 7*l.* 13*s.* in respect of the charge for pilotage of the said vessel into Liverpool, and the sum of 10*l.* in respect of the charge for a steamer which towed her into Liverpool.

The plaintiffs also under the circumstances aforesaid, and at the request, and by the like direction of the said master, paid the sum of 43*l.* 0*s.* 9*d.* in respect of the charge for dock dues, the sum of 6*l.* 10*s.* 11*d.* in respect of the charge for light dues for and on account of the said vessel at Liverpool, and the sum of 2*l.* in respect of the charge for watermen and a boat engaged in docking the said vessel.

The master of the said vessel thereupon requested the plaintiffs to pay, and they therefore paid the sum of 3*l.* 3*s.* for reporting the said vessel at the custom house at Liverpool, and the plaintiffs also, at the request and by the direction of the said master, disbursed various sums of money for and on account of the said vessel in respect of telegrams and postages, &c., amounting to 2*l.* 6*s.* 6*d.*

The said sums before mentioned were all advanced and paid in the necessary service of the said vessel, and for necessary expenses of the said port, and are still due and unpaid to the plaintiffs.

The said sums were paid, and the said sums advanced by the plaintiffs upon the credit of the said vessel, and not merely on the personal credit of the said master.

On the 27th of April last the present action came on for hearing, and the judge pronounced for the claim of the plaintiffs together with interest and costs, but without prejudice to any other claims against the vessel, or to any question as to priority of payment.

Previously to the hearing of the action the *St. Lawrence* had been sold under an order of Court obtained in one of the actions of bottomry against her, and had realised the sum of 1000*l.*, without deducting the expenses of sale, and the sum of 962*l.* 4*s.* 6*d.*, representing the freight earned by her on the voyage from Baltimore to Liverpool, had been paid into the registry. In these circumstances the owners of the cargo of the *St. Lawrence* apprehended that if the claims of Messrs. Moos & Co. were paid out of the proceeds of the *St. Lawrence* and her freight in priority to the claims of the bottomry bondholders, such proceeds would, after payment of the claims of the crew for the balance of their wages, be insufficient to satisfy the bonds, together with interest and costs, and that the bondholders would in such case resort to the cargo of the *St. Lawrence*, and entered an appearance in the present action as interveners.

Myburgh, on behalf of the plaintiffs, moved the judge in Court

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to order payment of the amount of the plaintiffs' claim to be paid to them out of the fund in Court. The plaintiffs have the same rights as the seamen and the persons by whom the pilotage and towage services have actually been performed, and are in the same position as such seamen and other persons would have been in if their claims had remained undischarged: *The William F. Safford.* (1) Similarly the plaintiffs are entitled to the same priority in respect of the sums they paid in discharge of the light dues due from the *St. Lawrence,* for if the light dues had not been paid payment of them might have been enforced by distress, and the ship could not have been cleared (17 & 18 Vict. c. 104, ss. 400, 401). The item claimed in respect of the dock dues of the *St. Lawrence* at Liverpool must also rank above the bottomry claims in this case. Without adverting to the statutory powers which the dock companies at Liverpool possess to enable them to enforce payment of their dues (2), it is sufficient to point out that the docking of the *St. Lawrence* was necessary in order to enable her to earn the freight now in Court.

W. G. F. Phillimore, for the interveners. The owners of cargo admit that the plaintiffs are right in their contention, that the sums advanced by them for wages, pilotage, watermen, and light dues, ought to be paid out to them in priority to the claims of the bondholders, but they contend that the payment of the amounts advanced for dock dues and reporting the *St. Lawrence,* and for postages and telegrams, ought to be postponed to the bonds. The rights of a bottomry bondholder have always been considered to be greater than the rights of a material man, and if the security of the bondholder can be lessened by the amount of whatever sums may afterwards be expended for necessaries, the difficulty of raising money on bottomry will be much increased.

SIR ROBERT PHILLIMORE. It is admitted that the items of the claim, which consist of money advanced to pay the wages, pilotage, towage, watermen, and light dues, mentioned in the statement of claim, ought to be paid out to the plaintiffs' in priority to the claims of the bondholders. The only question, therefore,

(1) Lush. 69.

(2) See the Mersey Docks Consolidation Act, 1859 (21 & 22 Vict. c. xcii.), ss. 253, 254.

which I have to decide is, as to the amounts advanced by the plaintiffs in respect of dock dues, reporting the *St. Lawrence*, and the sum expended in disbursements, such as telegrams and postages. Now I am of opinion that the amount paid by the plaintiffs in respect of dock dues is in the same category as the amounts paid by them in respect of towage and pilotage, claims which it has been admitted take precedence of the amounts secured on the bottomry bonds executed previously to the time when the *St. Lawrence* arrived at Liverpool. It is true that pilotage and towage claims are not mentioned by Dr. Lushington in the case of *The William F. Safford* (1) as claims which, if paid by a third party, confer any priority on the person so paying them, but the reason of that decision applies to such claims, and indeed I do not understand it to be disputed that a person who discharges claims of that character has the same rights and remedies for their recovery as the person to whom the money has been paid. I consider, therefore, that the sum advanced by the plaintiffs to pay these dock dues must be paid out to them at once. The reasons which apply to the dock dues in this case can have no application to the items which consist of sums advanced for reporting the *St. Lawrence* or for despatching telegrams or for postages. I must therefore reject the motion as regards these two last items. The motion will be granted as to all the other items of the plaintiffs' claim.

Solicitors for plaintiffs: *Stone & Fletcher.*
Solicitors for interveners: *Simpson & North.*

(1) Lush. 69.

1880
Aug. 3.

THE MACLEOD. (1880 W. 01284.)

Wages and Disbursements—Habitual Drunkenness of Master.

A shipmaster who has been habitually drunk during his employment cannot maintain an action for his wages.

THIS was an action by the late master of the ship *Macleod* for wages and disbursements. The statement of claim alleged in substance that the plaintiff served on board the *Macleod* as her master from the 1st of June, 1879, until the 18th of June, 1880, when he was discharged, at wages after the rate of 250*l.* per annum agreed by the owners of the said vessel to be paid to the plaintiff for his said services. Whilst so serving as master of the *Macleod* he performed his duty as master and earned his wages, and he also whilst serving as such master made divers disbursements on account of the said ship.

The plaintiff claimed the sum of 307*l.* 9*s.* 4*d.*, the balance alleged to be due to him, together with ten days' double pay, according to the provisions of the Merchant Shipping Act, 1854.

The statement of defence denied that the plaintiff had performed his duty as master or earned his wages, and alleged that he had forfeited all claim to wages by reason of gross and frequent drunkenness on ship and on shore while he was in command, and by reason of neglect of duty and carelessness of navigation owing to such drunkenness; that he had made certain disbursements on account of the ship, but that such disbursements were in many respects incorrectly stated by him; that he had received, or ought, but for his wilful neglect, to have received sums for which he had not given credit; and that on the balance of the plaintiff's accounts nothing was due from the defendants to the plaintiff.

By way of counter-claim the defendants alleged, inter alia, that whilst the plaintiff was in command of the ship he negligently chartered the *Macleod* at an improvidently low rate of freight without due inquiry or notice to the defendants, whereby the defendants suffered loss and damage.

Aug. 3. The action was heard before the judge in Court.

Witnesses for the plaintiff and a witness for the defendants were examined. The result of their evidence is stated in the judgment.

It was agreed with the consent of the Court that the questions of damage arising out of the portion of the counter-claim above set out should, with all questions as to the amount of disbursements claimed, be referred to the registrar and merchants.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiff.
Cohen, Q.C., and *Myburgh*, for the defendants.

SIR ROBERT PHILLIMORE. In this case the master is suing for his wages, and he is proved to have been guilty of not occasional, but habitual intoxication. In the case of *The Roebuck* (1) I had occasion to consider the law very fully, and it may be desirable, as I am obliged to come to a decision adverse to the suitor in this case, that I should state my view of the law. I cannot do better than read the following passage from the judgment of Lord Stowell in the case of *The Exeter*. (2)

> Upon the matter of drunkenness, the Court will be no apologist for that; it is an offence peculiarly noxious on board a ship, where the sober and vigilant attention of every man, and particularly of officers, is required. At the same time the Court cannot entirely forget, that in a mode of life particularly exposed to severe peril and exertion, and, therefore, admitting in seasons of repose something of indulgence and refreshment; that indulgence and refreshment is naturally enough sought by such persons in grosser pleasures of that kind; and, therefore, that the proof of a single act of intemperance, committed in port, is no conclusive proof of disability for general maritime employment.

And in the case of *The Lady Campbell* (3), which was a cause of wages instituted on behalf of a ship's steward, the same learned judge, alluding to the plaintiff, said,

> I learn from one of his two witnesses that he had been drunk once or twice on the whole of the outward voyage, which lasted nine months. Now, though this Court does not mean to countenance any criminal excess of that kind, yet it cannot so far blind itself to the ordinary habits of men living for such a length of time in a frequent condition of extreme peril and fatigue, as to feel much surprise that a seaman, having the command, as this man from his station had of strong liquors, should have been betrayed into two acts of indulgence of that nature, nor can it consider them as sinking him below the common average of a seaman's morality.

(1) 2 Asp. Mar. Law Cas. (N.S.) 387.
(2) 2 Rob. 261.
(3) 2 Hagg. 5.

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In the case of *The Thomas Worthington* (1), my learned predecessor said :—

Cases indeed, may occur, even in this Court, where the misconduct may be of so gross a description that, independent of any actual loss sustained by the owners, the entire forfeiture of wages would ensue; as for instance, if a master had attempted to commit barratry; or if throughout a voyage he had shewn gross incapacity, or had been constantly drunk. In either of these cases, would this Court be justified in pronouncing for any part of his wages under the contract? Unquestionably not; and if any such case came before me I should not hesitate for a single moment in rejecting his claim *in toto*.

I regret to say the evidence in this case is such that I must pronounce that the plaintiff has forfeited his wages.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitor for defendants: *J. McDiarmid.*

July 27.

THE ALHAMBRA. (1880 E. 45.)

Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 6—*Meaning of Words*, "*Safe Port, or as near thereunto as she can safely get*"—*Rights of Parties when Ship is unable to lie afloat in Port of Discharge without being lightened.*

Where a vessel is chartered to proceed with cargo to a safe port as ordered, or as near as she can safely get, and always lie and discharge afloat, she may lawfully be ordered to discharge at a port, where she cannot by reason of her draught lie afloat without being lightened, provided she can be lightened with reasonable despatch and safety in the immediate vicinity of the port or in the port itself.

A vessel was chartered to proceed with a cargo of grain from Baltimore to Falmouth for orders, thence to a safe port in the United Kingdom as ordered, or as near as she could safely get, and always lie and discharge afloat. The vessel was ordered to Lowestoft. Her draught of water when loaded was such that she could not lie afloat in Lowestoft Harbour without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in Lowestoft Roads. The consignee offered at his own expense to lighten the vessel in the roads, but the master refused to proceed to Lowestoft to discharge, and went to Harwich as the nearest safe port, and there discharged the cargo :—

Held, that the consignee was entitled to recover damages against the shipowner for the neglect of the master to discharge at Lowestoft.

Cited in *The Ardgarth*, [1899] P. 135, C.A.

THIS was an action instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of the consignees of a

(1) 3 W. Rob. 128, at p. 133.

cargo of maize, laden on board the Norwegian barque *Alhambra*, against that vessel. (1)

The statement of claim was delivered on the 2nd of March, 1880, and contained, inter alia, the following allegations:—

2. On the 8th day of November, 1879, the *Alhambra*, then being in the harbour of Hampton Roads, in the United States of America, a charterparty was entered into between the master of the said ship, on behalf of himself and the owners of the said ship of the first part, and Messrs. James Knox & Co. of the second part, whereby the said master agreed to charter the said barque to the said Messrs. Knox & Co. for a voyage from Baltimore to Queenstown or Falmouth (master's option), for orders, thence to a safe port in the United Kingdom, or to ports on the Continent within certain specified limits as ordered, or as near thereunto as she could safely get, and always lay and discharge afloat, certain risks and perils always excepted. The said charterers agreed to provide and furnish to the said vessel a full and complete cargo of wheat or corn in bulk $\frac{\text{and}}{\text{or}}$ in ship's bags (master's option), vessel guaranted to carry 3000 quarters at least, and to pay to the said master or his agent for the use of the said vessel during the voyage aforesaid, if calling for orders as above, and discharged at a safe port in the United Kingdom, certain agreed rates of freight. The cargo or cargoes to be received and delivered alongside of the vessel within reach of her tackles. Lighterage (if any) always at the risk and expense of the cargo. Bills of lading to be signed at any rate, as required by charterers, without prejudice to the said charter.

3. Pursuant to the said charterparty the said charterers shipped on board the *Alhambra*, at Baltimore aforesaid, 3015 quarters of mixed Indian corn in bulk and ship's bags, for which the master of the said ship on the 19th day of November, 1879, signed and delivered a bill of lading by which he acknowledged the shipment by the said charterers on board the said barque, then bound for Queenstown or Falmouth for orders as per charterparty, of 3015 quarters of mixed Indian corn in bulk and ship's bags, and undertook to deliver the same in the like good order and condition, at such port as ordered as aforesaid, upon payment of freight, all conditions being as per charterparty.

4. The ship duly sailed on her voyage with the said cargo on board, and the master proceeded to Falmouth, arriving there on the 27th day of December, 1879, and on the 5th day of January, 1880, duly received orders to proceed with his cargo to Lowestoft and there discharge.

5. On the 5th day of January, 1880, the plaintiffs became the purchasers of the said cargo, and the said bill of lading was duly indorsed to the plaintiffs, and by reason of such purchase and endorsement the property in the said cargo passed to the plaintiffs, and the plaintiffs thereby became the owners of the said cargo and assignees of the said bill of lading within the meaning of the 6th section of the Admiralty Court Act, 1861, and all things happened to entitle the plaintiff

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(1) The action was originally commenced in the county court of Suffolk holden at Ipswich, but was transferred to this Court under the provisions for transfer contained in the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71).

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to have the said cargo delivered to them as ordered in accordance with the terms of the said charterparty and bill of lading at Lowestoft.

6. The master of the said ship, notwithstanding such orders as aforesaid, wholly refused to proceed to Lowestoft, but proceeded with his said ship and cargo to Harwich and discharged his said cargo at Harwich, and the plaintiffs were compelled to and did accept delivery of the said cargo under protest at Harwich.

The statement of claim concluded by claiming damages for the breaches of contract proceeded for, and the expenses and losses consequent thereon.

July 13, 14, 15. On these days the action was heard before the judge.

Witnesses were examined orally in Court on behalf of the plaintiffs. The evidence of the witnesses as to the proportion of the cargo which it would have been necessary to discharge in order to enable the vessel to lie afloat in the harbour at all times of the tide was conflicting. It was variously stated to be from two-thirds to one-third. The substance of the rest of the evidence, so far as material, appears from the judgment.

Milward, Q.C., and *J. P. Aspinall*, for the plaintiffs. The charterer was within his right in ordering the *Alhambra* to go to Lowestoft. The meaning of the words "safe port" is not confined to a port where a vessel can be taken at all times of tide with a full cargo, but must extend to include a port like Lowestoft, where the *Alhambra* could enter and remain in safety after a reasonable quantity of her cargo had been discharged outside. Under the ordinary form of charter the master is bound if necessary to wait outside the port for a favourable tide which would enable his vessel to reach the place of the discharge within a reasonable time. *Parker* v. *Winlow* (1); *Bastifell* v. *Lloyd* (2); *Schilizzi* v. *Derry*. (3) So also there is an obligation on a master to discharge a portion of his cargo outside the port, if to do so would be reasonable and in accordance with the practice of the port: *Brereton* v. *Chapman* (4); *Hillstrom* v. *Gibson* (5); *Capper* v. *Wallace* (6); *Hayton* v. *Irwin*. (7) In this case it is not only in evidence that it was the

(1) 7 E. & B. 942.
(2) 1 H. & C. 388.
(3) 4 E. & B. 473.
(4) 7 Bing. 559.
(5) 8 Sess. Cas. (3rd Series) 463; 3 Mar. Law Cas. 362.
(6) 5 Q. B. D. 163.
(7) 5 C. P. D. 130.

custom for vessels which were too deep to enter the port of Lowestoft to discharge a portion of their cargo in the roads outside, but the charter contains an express provision as to lighterage, which shews that lighterage was in the contemplation of the parties. The case must be treated exactly as if Lowestoft had been inserted in the charter as the port of discharge, and if this had been the case, the master of the *Alhambra* would certainly not have performed the conditions of taking his vessel "as near to" Lowestoft "as he could safely get," unless he had proceeded to Lowestoft Roads, where the charterers were prepared to have unloaded him sufficiently to have enabled him to have gone into Lowestoft Harbour, and to have lain there afloat at all times of the tide: *Ogden* v. *Graham.* (1)

Butt, Q.C., and *E. C. Clarkson*, for the defendants. None of the cases cited on the other side are authorities for the proposition that a port in which a vessel cannot lie afloat during the discharge of her whole cargo is a "safe port" within the meaning of a charterparty which provides that the vessel shall discharge always afloat. All the cases which have been cited on behalf of the plaintiffs are cases in which the port of discharge was either actually named in the charter, or had been assented to by the master on his signing bills of lading or receiving orders to proceed to such port, and this being the case, the master was bound, the charters being in the ordinary form, to proceed as near as he could safely get to such port unless prevented by excepted perils: *General Steam Navigation Co.* v. *Slipper.* (2) In the present case, however, the master of the *Alhambra* never accepted the orders given him to proceed to Lowestoft. Moreover, even on the assumption that the charterer had the power under the charter in this case of ordering the *Alhambra* to a port where she could not lie afloat when fully laden, yet the port to which the charterer had the power of so ordering her could only be one outside which she could be lightened whilst lying in safety, and one where she could discharge without unloading an unreasonable amount of her cargo: *Hillstrom* v. *Gibson* (3); *Capper* v. *Wallace.* (4) Lowestoft Roads was an unsafe place for the *Alhambra* to remain

(1) 1 B. & S. 773; 31 L. J. (Q.B.) 26.
(2) 11 C. B. (N.S.) 493.
(3) 8 Sess. Cas. (3rd Series), 463.
(4) 5 Q. B. D. 163.

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whilst lightening, and she could not have entered and have lain afloat in the port of Lowestoft unless she had been lightened to an unreasonable extent, and had had at least more than the one-third of her cargo taken out of her. In these circumstances the master was justified in refusing to take his vessel to Lowestoft. Reliance has been placed on the provision as to lighterage in the charter, but that provision is intended to apply to lighterage after the arrival of the vessel at the port of discharge.

Milward, replied.

Cur. adv. vult.

July 29. SIR ROBERT PHILLIMORE. As this is the first case of the kind which has come before this Court, I have taken a few days to consider my judgment upon it. The *Alhambra,* a Norwegian barque of the burden of about 469 tons, was chartered at Baltimore in the United States of America to go from that place to Queenstown or Falmouth for orders, and thence to a safe port in the United Kingdom, or certain ports on the continent, or as near thereunto as she could safely get, and always lay and discharge afloat. It was provided also among other things that lighterage (if any) should be always at the risk and expense of the cargo. The cargo consisted of Indian corn in bulk and in ship's bags. The ship sailed to Falmouth, at which port she arrived on the 5th day of January, 1880. At the same date the cargo was sold by Borrowman & Co., who had bought it, to Messrs. Everett, to whom the bills of lading were duly endorsed. No port was named in the charterparty, but Messrs. Everett & Co. gave the following orders to the master of the *Alhambra* to proceed to Lowestoft and there discharge the cargo.

Falmouth, January 5th, 1880.

Captain Corneliussen of the *Alhambra,* Falmouth.

We have just received a communication by telegraph, of which the following is a copy:—

From Borrowman, Phillips, & Co., London, to G. C. Fox, & Co., Falmouth.—Please order *Alhambra* with maize from Baltimore to proceed to Lowestoft. We repeat *Alhambra* to Lowestoft for discharge.

Fox & Co. were the agents of Borrowman & Co. This was followed up by a letter the next day, the 6th of January.

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Falmouth, 6th January, 1880.

Captain Corneliussen of the *Alhambra*, Falmouth.

Sir,—We have just received a communication by telegraph, of which the following is a copy :—

From Borrowman, Phillips, & Co., London, to G. C. Fox & Co., Falmouth.—Insist upon *Alhambra* proceeding to Lowestoft for discharge.—Give captain notice owners cargo will hold him responsible for any and all losses incurred by his delay.

On the same day the master of the *Alhambra* sent a telegram, of which the following is a copy, to the harbour-master at Lowestoft :—

Falmouth.—What draught water can safely always afloat discharge Lowestoft please answer—reply paid.—Address Fox & Co.

To this telegram the harbour-master of Lowestoft sent the following answer :—

Your message, sixteen feet average high water, eleven low, soft muddy bottom, never known vessel take harm Lowestoft Harbour.

On the 6th of January the master of the *Alhambra* telegraphed to Borrowman & Co. as follows :—

If you will give solid guarantee against all consequence, I will proceed to Lowestoft Roads. If not, I will protest against your order and proceed Harwich if you cannot give me another safe discharging place more convenient for you to receive my cargo according to charterparty.—Telegraph reply.

Of the proposal for a guarantee I think no notice was taken by Borrowman & Co., who were quite justified in refusing to enter into a new contract which this would have been, and in abiding by the contract already made.

On the 20th of January the plaintiffs, Everett & Co., sent the following letter to the master of the *Alhambra* :—

Take notice that I am the consignee of the cargo of maize laden on board your vessel, and require you forthwith to proceed to Lowestoft and deliver such cargo to me there, according to the terms of the charterparty and bill of lading. And take further notice that I am prepared to pay freight as provided by the charterparty, and at my own expense to lighten your vessel in Lowestoft Roads sufficiently to enable her to lie always afloat in Lowestoft Harbour, if necessary, should her draught of water so require.

The master went on to Harwich and there discharged his cargo. The plaintiffs, Everett & Sons, then wrote as follows :—

To Captain H. Corneliussen, of the barque *Alhambra*.

Sir,—Take notice that I receive the cargo laden on board your vessel and

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consigned to me at Lowestoft under protest in Harwich Harbour, reserving my right to proceed against you to recover the damages which I have sustained, and may sustain, in consequence of your refusing to proceed to Lowestoft, and there deliver such cargo, according to the terms of your charterparty.

Dated this 20th day of January, 1880.

W. Everett & Sons, for W. S. Everett.

On this state of facts the plaintiffs claim damages for a breach of contract. The defendants maintain that there was no breach of contract, inasmuch as Lowestoft was not a safe place of discharge for the *Alhambra*, and that Harwich was the nearest safe port in which the cargo could be discharged. It appears that the *Alhambra* drew 16 ft. 6 in. of water when laden, 8 or 9 feet without a cargo, and 11½ feet in ballast. Lowestoft Roads afford a safe and good anchorage, sheltered from all winds but S.S.W. Tansley, a pilot resident at Lowestoft, who was called as a witness for the plaintiffs, said he had seen 200 sail in these roads sometimes. When the cargo was lightened down to twelve feet, the *Alhambra* could go and be afloat inside the harbour. From high water to low six hours intervened. The discharge into lighters in the roads appears to be usual.

On Monday, the 19th of January, the day on which the *Alhambra* arrived off Lowestoft, the depth of water at high water in the morning was 17 ft., in the evening 15 ft. 6 in., at low water in the evening the depth in the harbour was 11 ft. 6 in. On the 20th of January at high water on the morning tide there were 16 ft. 9 in. in the harbour; on the evening tide 16 ft. 3 in., at low water 12 ft. 9 in. in the morning, and 13 ft. 3 in. in the evening. On Wednesday, the 21st of January, the depth of water in the harbour on the morning tide at high water was 17 ft. 6 in. so that it would appear that on the morning tide of the 19th and 21st the *Alhambra* might have entered, if not wholly without lightening, yet with very little lightening. In the evening there was at high water a depth of 15 ft. 6 in., and at low water a depth of 13 ft. 6 in., so that by lightening the cargo so as to reduce the draught of the vessel by three feet the *Alhambra* could have entered at low tide on that day. (1)

(1) The depth of water as deposed to in the evidence was the depth in the "Lock," which indicates the depth in the inner and outer harbour. The depth on the bar is always greater than the depth in the lock.

It appeared from the evidence that vessels with a draught of sixteen feet entering the harbour did usually take the ground, but there is a soft mud bottom, and the evidence is that no injury was ever done to vessels so entering. The general custom certainly is for vessels to lighten in the roads, and then go into port. It appears that the *Alhambra* sailed for Lowestoft on the 15th of January, and on the 19th sighted that place, and took a pilot on board when abreast of Lowestoft about five or six miles off. The master never went nearer to Lowestoft, or ascertained by personal inspection the state of the port. This pilot has not been examined, but it would seem that the master sailed with him some distance, and then took a Harwich pilot on board, and went to Harwich.

It is contended by the defendants, first, that Lowestoft is not a safe port where the ship can lie and discharge afloat, within the meaning of the charterparty. Secondly, that the *Alhambra* was not bound to discharge in the roadstead to the extent that the evidence shews that she must have discharged in order to enter the harbour and lie afloat at any time of tide. Various cases were cited by counsel, but the law as applicable to this case now before me appears to be laid down in the following judgments.

In *Schilizzi* v. *Derry* (1) the defendant had agreed by charterparty that his ship, then in London, should sail to Galatz or Ibrail, or so near thereunto as she might safely get, and there load a cargo from plaintiff's factor, and therewith proceed to a port in the United Kingdom, unless prevented by the causes usually excepted. The ship arrived at the mouth of the Danube on the 5th of November, and found not enough water to cross the bar. It was not safe for her to remain off the mouth later than the 11th of December, and on that day she proceeded to Odessa and took in a cargo from other parties. After the 7th of the following January there was enough water to enable the ship to cross the bar, and sail to Galatz. Campbell, C.J., said:—

I am really unable to entertain any doubt of the plaintiff being entitled to recover. As to the first plea; the meaning of the charterparty must be that the vessel is to get within the ambit of the port, though she may not reach the actual harbour. Now could it be said that the vessel, if she was obstructed in entering the Dardanelles, had completed her voyage to Galatz. There can, therefore, be

(1) 4 E. & B. 873.

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no doubt as to the first issue. Then as to the second issue, were the defendants prevented by dangers and accidents of the seas from completing the voyage? Clearly not. For though from the 5th of November to the 7th of January the vessel could not cross the bar at the Soulina mouth of the Danube, yet she might have done so after the 7th of January, and would then have reached her port of destination.

Crompton, J., said:—

I cannot see any doubt. Here is a positive contract to proceed to a port unless prevented by dangers and accidents of the seas, &c. That must mean prevented from doing so at all: it would be most dangerous to hold that a temporary obstruction puts an end to the obligation.

The case of *Bastifell* v. *Lloyd* (1) was an action on a charter-party, by which the plaintiff and defendant agreed that the plaintiff's ship should proceed to Llanelly, and take on board a cargo of culm, and being so loaded should therewith proceed with all convenient speed to Cole's Wharf, Rochester, or so near thereto as she may safely get, and deliver the same on being paid freight, &c. The ship arrived with the cargo at Rochester on the 24th of October, and was moored at the buoys about 500 yards from and opposite to Cole's Wharf. On the 25th of October the master gave the defendant's agent notice that the vessel was ready to discharge her cargo, and he desired the master to come alongside Cole's Wharf. At that time there was not sufficient water for the vessel to come alongside the wharf, and the agent refused to send lighters to receive part of the cargo so as to lighten the vessel and enable her to come alongside the wharf. The state of the tide did not allow the vessel to be removed to Cole's Wharf until the 4th of November, and on the following day she commenced discharging her cargo. In an action for demurrage, it was holden that the master was bound to take the vessel alongside Cole's Wharf.

Bramwell, B, who was one of the judges who heard the argument, said:—

I cannot help thinking that the defendant is right when he says that the vessel was bound to go alongside the wharf. As pointed out by the Lord Chief Baron, the object of the charterer was to save the expense of lighterage. Suppose the shipowner found that he could not get alongside the wharf for two or three days, when the tide would rise high, he would clearly have been bound to wait, since he could then safely get there. He has undertaken to go alongside Cole's Wharf,

(1) 1 H. & C. 388.

unless the want of safety renders it necessary that he should stop short of that place. It is admitted that by waiting a short time, he not only could, but did, get there. It might be different if there were only one or two tides in the year which would enable the vessel to reach the wharf, but it is not necessary to say what the master ought to do in that case. As it is, convenience and common sense are in favour of the defendant.

In the Scotch case of *Hillstrom* v. *Gibson* (1), which is considered, I believe, the leading case on this question, the master had become bound under his charterparty to proceed to Glasgow or as near thereunto as "the ship" might safely get, and lie afloat at all times of tide. On arriving at a point off Greenock, known as "the Tail of the Bank," it was found that she could not with her full cargo lie afloat in Glasgow Harbour at all times of tide, the consignee who was at hand requested the master to discharge what was necessary to lighten the ship, i.e., one-fifth of the cargo and to proceed with the residue to Glasgow. The majority of the Court held that this was a reasonable request, that it was in the course of the master's duty to proceed with the residue of the cargo to Glasgow, and that he could not claim demurrage for the time taken in reaching that port.

Lord Kinlock, in delivering his judgment, says:—

I think the words "as she may safely get," are reasonably to be construed to mean "as it is possible to take her with safety." And this possibility must be considered with reference to the due or usual method of accomplishing such safety. If the obstacle to her proceeding was a bar at the mouth of the harbour, which a slight lightening would enable her to surmount, I cannot think that the master would be entitled to refuse the lightening, and to insist on delivering the whole cargo in the open sea. . . . The proceeding at the Tail of the Bank, that is the unloading of one fifth of the cargo, was not in any sound sense a delivery of the cargo; it was lightening for the purposes of navigation. Had the proposal been to take out four-fifths of the cargo at the Tail of the Bank and to go on with the remaining one-fifth, the shipmaster's argument would have had a great deal more of plausibility; for in such a case a great deal may depend on the difference of more and less: it may draw that very distinction between lightening and discharging which is all important in the case.

In the case of *Nelson* v. *Dahl* (2) where there was a provision in the charterparty that the ship should be brought to a particular place or as near thereto "as she may safely get," it was laid down "that in such a contract it must be considered whether the obstruction to the ship entering the docks was of a

(1) 8 Sess. Cas. (3rd Series), p. 463. (2) 12 Ch. D. 569.

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temporary or permanent nature, and that an obstruction must be considered a permanent one which cannot be removed in a time which is reasonable, having regard to the interests of the ship-owner and of the consignee."

This doctrine as to a temporary obstacle not being a sufficient impediment to the execution of the contract, was applied to the case of overdraught of a vessel in the following case: In *Capper & Co.* v. *Wallace Brothers* (1), it was agreed by charterparty that a ship was to take in a full cargo at Bombay, and proceed therewith to a safe port on the Continent between Havre and Hamburgh, as ordered, "or as near thereto as she might safely get." The cargo was to be brought to and taken from alongside at merchant's risk and expense. The ship was ordered by the charterers to Koogerpolder, in Holland. Koogerpolder is some way up a canal, and the ship, with her full cargo, drew too much water to proceed up the canal. No arrangements had been made by the charterers or consignees for taking delivery of any part of the cargo at the mouth of the canal. At least one-third of the cargo had to be unloaded in order to enable the ship to proceed up the canal, and this was done. The plaintiffs claimed the pilotage, harbour dues, and other expenses of going into port as well as demurrage, but afterwards consented to accept what it would have cost to lighter the whole.

LUSH, J., sitting with MANISTY, J., in delivering judgment, said:—

It cannot, we think, be laid down as an inflexible rule that when a ship has got as near to the port as she can get, and the only impediment to proceeding further is over-draught, the master is under all circumstances entitled to consider the voyage at an end. He is bound to use all reasonable means to reach the port. The words "as near thereto as she can safely get," must receive a reasonable and not a literal application. The over-draught may be such, and the cargo so easily dealt with, as that the surplus may be removed and the ship sufficiently lightened without exposing her to extra risk or the owner to any prejudice, and without substantially breaking the continuity of the voyage, and in such case if the consignee is at hand to receive the surplus cargo and so relieve the over-draught, we are of opinion that it would be the duty of the master to lighten the ship and proceed to the port. This is the principle laid down by the Court of Session in the case of *Hillstrom* v. *Gibson*. (2)

1 QBD 245
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(1) 5 Q. B. D. 163. (2) 8 Sess. Cas. (3rd Series), 463.

Applying the principles of law enunciated in these decisions to the facts and circumstances of the case before me, I am of opinion that the breach of contract alleged by the plaintiffs is established, and that the defendants must pay the damages consequent upon such breach.

Solicitor for plaintiffs: *Coote.*

Solicitors for defendants: *Hughes, Hooker, Buttanshaw, & Thunder.*

ORDER IN COUNCIL,

Gazetted the 9th of April, 1880.

AT THE COURT AT WINDSOR,

the 24th day of March, 1880.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS, by "The Merchant Shipping Act Amendment Act, 1862," it was enacted that on and after the first day of June, one thousand eight hundred and sixty-three, or such later day as might be fixed for the purpose by Order in Council, the Regulations contained in the table marked C in the schedule to the said Act should come into operation and be of the same force as if they were enacted in the body of the said Act; but that Her Majesty might from time to time, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, annul or modify any of the said Regulations, or make New Regulations in addition thereto, or in substitution therefor; and that any alterations in, or additions to such Regulations made in manner aforesaid should be of the same force as the Regulations in the said schedule:

And whereas by the same Act it was further provided, that whenever it should be made to appear to Her Majesty that the Government of any foreign country was willing that the Regulations for preventing collisions contained in Table C in the schedule to the said Act, or such other Regulations for preventing collisions as are for the time being in force under the said Act, should apply to the ships of such country when beyond the limits of British jurisdiction, Her Majesty might, by Order in Council, direct that such Regulations should apply to the ships of the said

foreign country, whether within British jurisdiction or not; and it was further provided by the said Act, that whenever an Order in Council had been issued applying any Regulation made by or in pursuance of the said Act to the ships of any foreign country, such ships should, in all cases arising in any British court, be deemed to be subject to such Regulation, and should, for the purpose of such Regulation, be treated as if they were British ships:

And whereas by an Order in Council made in pursuance of the said recited Act, and dated the ninth day of January, one thousand eight hundred and sixty-three, Her Majesty was pleased to direct that there should be substituted for the Regulations contained in the schedule to the said Act certain Regulations appended to the said Order, and that the said appended Regulations should, on and after the first day of June, one thousand eight hundred and sixty-three, apply to French ships, whether within British jurisdiction or not:

And whereas by several Orders in Council subsequently made, Her Majesty was pleased to direct that the Regulations appended to the said recited Order should apply to ships of the countries specified in the said Orders, whether within British jurisdiction or not:

And whereas by Order in Council, dated the thirtieth day of July, one thousand eight hundred and sixty-eight, Her Majesty was pleased to make certain additions to the Regulations appended to the said first recited Order in Council:

And whereas by Order in Council, dated the fourteenth day of August, one thousand eight hundred and seventy-nine, Her Majesty, on the joint recommendation of the Admiralty and the Board of Trade, was pleased to direct that, on and after the first day of September, one thousand eight hundred and eighty, the said Regulations and the additions thereto should be annulled, and that there should be substituted therefor the New Regulations contained in the first schedule thereto, and that the same should, from and after the first day of September, one thousand eight hundred and eighty, apply to ships of the countries mentioned in the said second schedule thereto, whether within British jurisdiction or not:

And whereas Article numbered 9 of the Regulations appended to the said recited Order in Council of the ninth day of January, one thousand eight hundred and sixty-three, is as follows; that is to say,

Art. 9. Open fishing boats and other open boats shall not be required to carry the said lights required for other vessels; but shall, if they do not carry such lights, carry a lantern having a green slide on the one side, and a red slide on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

Fishing vessels and open boats, when at anchor or attached to their nets and stationary, shall exhibit a bright white light.

Fishing vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient.

And whereas the Article numbered 10 of the said New Regulations contained in the first schedule of the said recited Order in Council of the fourteenth day of August, one thousand eight hundred and seventy-nine, which said Article is to be in substitution for the said recited Article numbered 9, is as follows, that is to say,

Art. 10. (*a*) Open fishing boats and other open boats, when under way, shall not be obliged to carry the side lights required for other vessels; but every such boat shall, in lieu thereof, have ready at hand a lantern with a green glass on the one side, and a red glass on the other side; and on the approach of or to other vessels such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

(*b*) A fishing vessel and open boat, when at anchor, shall exhibit a bright white light.

(*c*) A fishing vessel, when employed in drift net fishing, shall carry on one of her masts two red lights in a vertical line one over the other, not less than three feet apart.

(*d*) A trawler at work shall carry on one of her masts two lights in a vertical line one over the other, not less than three feet apart, the upper light red, and the lower green, and shall also

either carry the side lights required for other vessels, or, if the side lights cannot be carried, have ready at hand the coloured lights as provided in Article 7, or a lantern with a red and a green glass, as described in paragraph (*a*) of this Article.

(*e*) Fishing vessels and open boats shall not be prevented from using a flare-up in addition, if they desire to do so.

(*f*) The lights mentioned in this Article are substituted for those mentioned in the 12th, 13th, and 14th Articles of the Convention between France and England scheduled to the British Sea Fisheries Act, one thousand eight hundred and sixty-eight.

(*g*) All lights required by this Article, except side lights, shall be in globular lanterns so constructed as to shew all round the horizon:

And whereas the Admiralty and the Board of Trade have jointly recommended to Her Majesty that the operation of the said recited Article numbered 10 of the New Regulations contained in the first schedule of the said Order in Council of the fourteenth day of August, one thousand eight hundred and seventy-nine, shall be suspended until the first day of September, one thousand eight hundred and eighty-one; and that in lieu thereof, and in substitution therefor, the recited Article numbered 9 of the Regulations appended to the said Order in Council of the ninth day of January, one thousand eight hundred and sixty-three, shall continue and remain in force until the said first day of September, one thousand eight hundred and eighty-one:

Now, therefore, Her Majesty, by virtue of the powers vested in Her by the said recited Act, and by and with the advice of Her Privy Council, is pleased to direct that the operation of the said recited Article numbered 10 of the New Regulations contained in the first schedule of the said Order in Council of the fourteenth day of August, one thousand eight hundred and seventy-nine, shall be suspended until the first day of September, one thousand eight hundred and eighty-one; and that in lieu thereof, and in substitution therefor, the said recited Article numbered 9 of the Regulations appended to the said Order in Council of the ninth day of January, one thousand eight hundred and sixty-three, shall continue and remain in force until the first day of September, one thousand eight hundred and eighty-one.

ORDER IN COUNCIL

RELATING TO THE REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

Gazetted the 17th of September, 1880.

AT THE COURT AT BALMORAL,

the 6th day of September, 1880.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS, by an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the ninth day of January, one thousand eight hundred and sixty-three, Her Majesty was pleased to direct:—First, that the Regulations contained in the Schedule to the said Act should be modified by the substitution for such Regulations of certain Regulations appended to the said Order:

Secondly, that the said Regulations appended to the said Order should, on and after the first day of June, one thousand eight hundred and sixty-three, apply to French ships, whether within British jurisdiction or not:

And whereas by several Orders in Council subsequently made, Her Majesty was pleased to direct that the Regulations appended to the said Order of the ninth of January, one thousand eight hundred and sixty-three, should apply to ships of the countries specified in the said Orders, whether within British jurisdiction or not:

And whereas by Order in Council dated the thirtieth day of July, one thousand eight hundred and sixty-eight, Her Majesty, on the joint recommendation of the Admiralty and the Board of

Trade, was pleased to make certain additions to the Regulations appended to the said first-recited Order in Council, for the purpose of explaining Articles 11 and 13 of the said Regulations, and of removing doubt and misapprehension concerning the effect of the said two Articles:

And whereas by Order in Council, dated the fourteenth day of August, one thousand eight hundred and seventy-nine, Her Majesty has been pleased to direct that on and after the first day of September, one thousand eight hundred and eighty, the said Regulations and the additions thereto shall be annulled, and that there should be substituted therefor, the New Regulations contained in the First Schedule thereto, and that the same shall from and after the said first day of September, one thousand eight hundred and eighty, apply to ships of the countries mentioned in the Second Schedule thereto, whether within British jurisdiction or not:

And whereas it has been made to appear to Her Majesty that the following Governments, that is to say,

The Government of Khelat;
" " Muscat;
" " Zanzibar;
" " Cochin;
" " Travancore;
" " Kutch; and
" " Kattyawar,

are willing that from and after the said first day of September, ne thousand eight hundred and eighty, the said New Regulations contained in the First Schedule of the said recited Order in Council, of the fourteenth day of August, one thousand eight hundred and seventy-nine, shall, with the exception of Article 10 thereof, apply to ships belonging to their respective countries, when beyond the limits of British jurisdiction:

Now, therefore, Her Majesty, by virtue of the power vested in Her by the said recited Act, and by and with the advice and consent of Her Privy Council, is pleased to direct:

That from and after the first day of September, one thousand eight hundred and eighty, the said New Regulations for preventing

collisions at sea, contained in the First Schedule of the said recited Order in Council, of the fourteenth day of August, one thousand eight hundred and seventy-nine, shall, with the exception of Article 10 thereof, apply to ships belonging to the following countries; that is to say,

Khelat;
Muscat;
Zanzibar;
Cochin;
Travancore;
Kutch; and
Kattyawar,

whether within British jurisdiction or not.

ORDER IN COUNCIL.

Gazetted the 19th of March, 1880.

RULES AND BYE-LAWS FOR THE NAVIGATION OF THE RIVER THAMES.

AT THE COURT AT WINDSOR,

the 18th day of March, 1880.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS, by the "Thames Conservancy Act," 1857, it is enacted that the Conservators of the River Thames shall have power and authority from time to time to make Bye-laws, for the regulation, management, and improvement of the River Thames, and the navigation thereof, in the manner thereby provided, and to impose penalties not exceeding five pounds for the breach or non-performance of such Bye-laws:

And whereas by the forty-seventh section of the said Act, it is enacted that no such Bye-laws shall be in force until the same have been sent to the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, and shall have been approved by one of them:

And whereas by the thirty-first section of the "Thames Conservancy Act, 1864," it is enacted, that from and after the thirty-first day of December, one thousand eight hundred and sixty-four, section forty-seven of "The Thames Conservancy Act, 1857," shall be repealed, and that Bye-laws made after the commencement of such repeal under the authority of either of the said recited Acts

shall not have any force unless and until they are allowed by Order of Her Majesty in Council:

And whereas by the forty-first section of "The Thames Navigation Act, 1866," it is enacted that, from the passing of the said Act, the Conservators of the River Thames shall have the same or the like powers and authorities over and with respect to the Thames and Isis from Staines to Cricklade, as they have by virtue of the Thames Conservancy Acts, 1857 and 1864, over and with respect to the Thames below Staines:

And whereas by the forty-second section of the same Act it is enacted, that the provisions of the said Conservancy Acts of 1857 and 1864 respecting Bye-laws shall extend and apply to Bye-laws for the purposes of the Upper Navigation Acts, or the said "Thames Navigation Act, 1866:"

And whereas by the twelfth section of "The Thames Conservancy Act, 1867," and by the eighth, ninth, and thirty-fifth sections of "The Thames Navigation Act, 1870," further powers were vested in the Conservators respecting the making of Bye-laws:

And whereas the said Conservators have, in exercise of the powers conferred upon them by the said recited Acts, made and submitted for the allowance of Her Majesty in Council certain rules and Bye-laws for the regulation, management, and improvement of the navigation of the River Thames, and amongst others certain Bye-laws which have been allowed by Orders in Council, dated respectively the fifth day of February, one thousand eight hundred and seventy-two, the twentieth day of November, one thousand eight hundred and seventy-three, the seventeenth day of March, one thousand eight hundred and seventy-five, and the eleventh day of July, one thousand eight hundred and seventy-seven:

And whereas it has been deemed expedient by the said Conservators to repeal in part the said last-mentioned Bye-laws, and to make new Bye-laws in lieu of the portions so repealed, in the manner set forth in the Schedule hereunto annexed:

And whereas the said new Bye-laws have been duly published in accordance with the said recited Acts; and it has been made to appear to Her Majesty that the said new Bye-laws are reasonable and proper.

Now, therefore, Her Majesty by virtue of the powers vested in Her by "The Thames Conservancy Act, 1864," and of every other power enabling Her in that behalf, by and with the advice of Her Privy Council, is pleased to allow the said new Bye-laws, and to direct that the same shall come into force from and after the first day of June, one thousand eight hundred and eighty.

Schedule referred to in the above Order.

Bye-laws numbered 28, 29, with subsections (*a*) (*b*) (*c*) (*d*) (*e*) (*f*) (*g*) (*h*) (*i*) (*j*), and 32 with subsections (*a*) (*b*) (*c*) (*d*), 33, 34, 35 with subsections (*a*) and (*b*), and 46 allowed by Order of Her Majesty in Council on the 5th February, 1872, and the Bye-law so allowed on the 20th November, 1873, and Bye-laws numbered 1, 4, 5, so allowed on the 17th March, 1875, and Bye-law No. 5 so allowed on the 11th July, 1877, shall after these present Bye-laws have been allowed by Order of Her Majesty in Council be, and the same are hereby repealed.

Interpretation.

The word "Vessel" shall mean any ship, lighter, barge, boat, wherry, punt, canoe and any kind of craft whatever, whether navigated by steam or otherwise.

The word "River" shall mean that part of the River Thames which is within the jurisdiction of the Conservators between Cricklade, in the County of Wilts, and Yantlet Creek, in the County of Kent.

1. In obeying and construing the following rules due regard shall be had to all dangers of navigation; and to any special circumstances which may render a departure from the rules necessary in order to avoid immediate danger.

Not to neglect proper precautions.

2. Nothing in the following rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Bye-Law for the Regulation of the Navigation of the River.

3. Every steam vessel navigating the river shall be navigated with care and caution, and at a speed and in a manner which shall not endanger the safety of other vessels or moorings, or cause damage thereto, or to the banks of the river. Special care and caution shall be used in navigating such steam vessel when passing vessels employed in dredging or removing sunken vessels or other obstructions. Steam vessels to be navigated with care as to speed.

If the safety of any vessel or moorings is endangered or damage is caused thereto or to the banks of the river by a passing steam vessel, the onus shall lie upon the owner of such steam vessel to shew that she was navigated with care and caution, at such speed and in such manner as directed by this rule.

Bye-Laws and Rules for the Regulation of the Navigation of the River between Yantlet Creek and Teddington Lock.

Rules concerning Lights.

4. The lights mentioned in the following rules, numbered 5 to 10 and no others, shall be carried in all weathers from sunset to sunrise.

5. A steam vessel when under way shall carry: Steamers' lights.

(*a*) On or before the foremast, or if there be no foremast, on a staff at the forepart of the vessel at a height above the hull of not less than 20 feet, and if the breadth of the vessel exceeds 20 feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to shew a uniform and unbroken light over an arc of the horizon of 20 points of the compass; so fixed as to throw the light 10 points on each side of the vessel, viz., from right ahead to two points abaft the beam on either side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles. Provided that steam

vessels which navigate both above and below London Bridge shall not be required to carry their lights at a greater height than 12 feet above the hull.

Above London Bridge.

Steam Vessels navigating only above London Bridge, may carry the white light at any convenient height above the stem.

(*b*) On the starboard side, a green light so constructed as to shew a uniform and unbroken light over an arc of the horizon of 10 points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least one mile.

(*c*) On the port side, a red light, so constructed as to shew a uniform and unbroken light over an arc of the horizon of 10 points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam on the port side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least one mile.

(*d*) The said green and red side lights shall be fitted in such a manner as to prevent these lights from being seen across the bow.

Steamers when towing to have two white lights.

(*e*) A steam vessel when towing another vessel, shall in addition to her side lights, carry two bright white lights in a vertical line one over the other, not less than four feet apart. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light which other steam vessels are required to carry.

Stern light when towing.

(*f*) A steam vessel towing may also carry a light shewing astern as a guiding light to the vessel or vessels towed, but this light must be so screened as not to be visible further forward than four points abaft her beam.

Sailing vessels' lights.

6. A sailing vessel under way, or being towed, shall only carry the side lights provided by (*b*) & (*c*) of Rule 5 for a steam vessel under way.

Anchor lights.

7. A steam vessel, a sailing vessel or a barge, when at anchor

in the river, shall carry where it can best be seen, at a height not exceeding 20 feet above the hull, a white light, in a globular lantern of not less than eight inches in diameter, and so constructed as to shew a clear uniform and unbroken light, visible all round the horizon, at a distance of at least one mile; provided always that where masted vessels are lying in tiers, the outermost off shore masted vessels only of each tier shall each carry a light similar to that required for vessels at anchor; but barges lying at the usual barge moorings in the river above Barking Creek shall not be required to exhibit such riding light.

Outer vessels in tiers.

8. A vessel which is being overtaken by another vessel below Barking Creek shall show from her stern to such last mentioned vessel a white light, or a flare up light.

Overtaken vessels.

This Rule shall not apply to boats, wherries, punts, or canoes.

9. All vessels when employed to mark the positions of wrecks or other obstructions shall exhibit two bright lights placed horizontally not less than 6 nor more than 12 feet apart.

Lights to mark position of wrecks.

10. Every steam dredger moored in the River shall, between sunset and sunrise, exhibit three bright lights from globular lanterns of not less than 8 inches in diameter, the said three lights to be placed in a triangular form, and to be of sufficient power to be distinctly visible with a clear atmosphere, on a dark night, at a distance of at least one mile, and to be placed not less than 6 feet apart on the highest part of the framework, athwartships.

Dredgers' lights.

Rules concerning Fog, &c., Signals.

11. All vessels entering or being overtaken by a fog shall be navigated with the greatest caution and at a very moderate speed.

Caution as to speed in a fog.

12. Every steam vessel navigating the river shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstruction, and also with an efficient bell. Every sailing vessel navigating the river shall be provided with an efficient fog horn, and also with an efficient bell.

Steam whistles and bell.

Fog horn and bell.

13. In fog, whether by day or night, the signals described in this Rule shall be used, that is to say:

Fog signals, when under way.

(*a*) A steam vessel under way shall make with her steam whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.

(*b*) A sailing vessel under way shall sound her fog horn, at intervals of not more than two minutes.

(*c*) All steam vessels and all sailing vessels when in the fairway of the river, and not under way, shall at intervals of not more than two minutes ring the bell.

Rules as to Speed and Mode of Navigation.

Slacken speed or stop.

14. Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, and shall stop and reverse if necessary.

Speed between Barking Creek and London Bridge.

15. Steam vessels navigating the River between Barking Creek and London Bridge, other than river passenger steamers certified to carry passengers in smooth water only, shall never exceed a speed of seven statute miles per hour over the ground whether with or against the tide.

Overtaking vessel to keep out of the way.

16. Every sailing vessel or steam vessel, overtaking any other vessel, shall keep out of the way of the overtaken vessel, which latter vessel shall keep her course.

BYE-LAWS and RULES regulating the NAVIGATION of the RIVER between YANTLET CREEK and a line drawn from BLACKWALL POINT to BOW CREEK.

Steam-whistle Signals.

17. When two steam vessels are in sight of one another and are approaching with risk of collision, the following steam signals shall be intimations of the course they intend to take:

When intending to pass port side to port side.

(*a*) One short blast of the steam-whistle of about three seconds duration to mean "I am directing my course to starboard, and intend to pass you portside to portside." The use of this signal shall be optional.

(*b*) Two short blasts of the steam-whistle, each of about three seconds duration, to mean "I am directing my course to port, and intend to pass you starboard side to starboard side." When intending to pass starboard side to starboard side.

This latter signal shall not be used in the case provided by Rule (22) where that Rule can be obeyed; but it shall be compulsory to use this signal when a departure from that Rule is necessary to avoid immediate danger.

18. When it is unsafe or impracticable for a steam vessel to keep out of the way of a sailing vessel, she shall signify the same to the sailing vessel by four or more blasts of the steam-whistle in rapid succession, the blasts to be of about two seconds duration. When a steam vessel cannot keep out of the way of a sailing vessel.

19. The signals by whistle mentioned in the preceding rules shall not be used on any occasion or for any purpose except those mentioned in the rules; and no other signal by whistle shall be made by any steam vessel unless it be by a prolonged blast of not less than five seconds duration. Prolonged blast of not less than five seconds duration.

Steering and Sailing Rules.

20. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:—

(*a*) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(*b*) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(*c*) When both are running free with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(*d*) When both are running free with the wind on the same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.

(*e*) A vessel which has the wind aft shall keep out of the way of the other vessel.

Steam vessels to keep out of the way of sailing vessels.

21. If a sailing vessel and a steam vessel are proceeding in such a direction as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

If steam vessel cannot keep out of the way. See Rule 18.

If, owing to causes beyond the control of those navigating the steam vessel, it is unsafe or impracticable for the steam vessel to keep out of the way of the sailing vessel, she shall signify the same to the sailing vessel by four or more blasts of the steam-whistle in rapid succession, as mentioned in Rule (18); the sailing vessel shall then keep out of the way.

Two steam vessels approaching to pass port side to port side.

22. When two steam vessels proceeding in opposite directions, the one up and the other down the river, are approaching one another so as to involve risk of collision, they shall pass one another port side to port side.

Rounding points.

23. Steam vessels navigating against the tide shall, before rounding the following points, viz., Coalhouse Point, Tilburyness, Broadness, Stoneness, Crayfordness, Cold Harbour Point, Jenningtree Point, Halfway House Point or Crossness, Margaretness or Tripcock Point, Bull Point or Gallionsness, Hookness, and Blackwall Point, ease their engines, and wait until any other vessels rounding the point with the tide have passed clear.

Steam vessels crossing the river.

24. Steam vessels crossing from one side of the river towards the other side, shall keep out of the way of vessels navigating up and down the river.

25. Where by the above rules one of two vessels is to keep out of the way, the other shall keep her course.

Bye-Laws and Rules regulating the Navigation of the River above Teddington.

26. When two steam vessels proceeding in opposite directions, the one up and the other down the river, are approaching one another so as to involve risk of collision, they shall pass one another port side to port side.

Steam vessels going against the stream to give way.

27. Steam vessels navigating against the stream shall ease, and if necessary stop, to allow vessels coming down with the stream to pass clear.

28. Every steam vessel shall, when under way, after sunset and before sunrise, either carry the lights required for steam vessels by Rule (5), or exhibit a bright white light on or above the stem, or on the funnel. Lights on steamers above Teddington.

29. The name of every steam vessel navigating the river shall be painted or marked and kept in plainly legible characters not less than two inches in length on the outside of both bows and on the outside of the stern; and such name and the residence of the owner shall be registered with the Conservators. Name of steam vessel to be marked on bows and stern.

30. Any person committing any breach of or in any way infringing any of these Bye-laws shall be liable to a penalty of, and shall forfeit, a sum not exceeding 5*l.*, which said penalty shall be recovered, enforced, and applied according to the provisions of The Thames Conservancy Acts, 1857 and 1864. Penalty.

ORDER IN COUNCIL,

Gazetted the 14th of December, 1880.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

AT THE COURT AT WINDSOR,

the 27th day of November, 1880.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 9th day of January, 1863, Her Majesty was pleased to direct:

First, that the Regulations contained in the Schedule to the said Act should be modified by the substitution for such Regulations of certain Regulations appended to the said Order.

Secondly, that the said Regulations appended to the said Order should on and after the first day of June, one thousand eight hundred and sixty-three, apply to French ships, whether within British jurisdiction or not.

And whereas by several Orders in Council subsequently made, Her Majesty was pleased to direct that the Regulations appended to the said recited Order should apply to ships of the countries specified in the said Orders, whether within British jurisdiction or not.

And whereas by Order in Council dated the thirtieth day of July one thousand eight hundred and sixty-eight, Her Majesty

was pleased to make certain additions to the Regulations appended to the said first-recited Order in Council:

And whereas by Order in Council dated the fourteenth day of August one thousand eight hundred and seventy-nine, Her Majesty, on the joint recommendation of the Admiralty and the Board of Trade, was pleased to direct that on and after the first day of September one thousand eight hundred and eighty, the said Regulations and the additions thereto should be annulled, and that there should be substituted therefor the new Regulations contained in the first schedule thereto, and that the same should, from and after the first day of September one thousand eight hundred and eighty, apply to ships belonging to the following countries; that is to say,

Austria-Hungary;	Italy;
Belgium;	Netherlands;
Chili;	Norway;
Denmark;	Portugal;
France;	Russia;
Germany;	Spain;
Great Britain;	Sweden, and
Greece;	United States.

whether within British jurisdiction or not.

And whereas by Order in Council dated the twenty-fourth day of March, one thousand eight hundred and eighty, Her Majesty on the joint recommendation of the Admiralty and the Board of Trade was pleased to direct that the operation of the Article numbered 10 of the new Regulations contained in the first schedule of the said Order in Council of the fourteenth day of August one thousand eight hundred and seventy-nine, should be suspended until the first day of September one thousand eight hundred and eighty-one, and that in lieu thereof, and in substitution therefor, the Article numbered 9 of the Regulations appended to the said Order in Council of the ninth day of January one thousand eight hundred and sixty-three, should continue and remain in force until the said first day of September one thousand eight hundred and eighty-one.

And whereas by Order in Council dated the sixth day of

September, one thousand eight hundred and eighty, Her Majesty on the joint recommendation of the Admiralty and the Board of Trade, was pleased to direct that from and after the first day of September one thousand eight hundred and eighty, the said new Regulations for preventing collisions at sea contained in the first schedule of the said recited Order in Council of the fourteenth day of August one thousand eight hundred and seventy-nine, should with the exception of the Article 10 thereof apply to ships belonging to the following countries; that is to say:

Cochin;	Muscat:
Kattyawar;	Travancore; and
Khelat;	Zanzibar;
Kutch;	

whether within British jurisdiction or not.

And whereas it has been made to appear to Her Majesty that the Governments of the several foreign countries hereinafter mentioned; that is to say:

The Government of Brazil;
„ „ Ecuador;
„ „ Hawaii;
„ „ Japan; and
„ „ Turkey,

are respectively willing that from and after the first day of September one thousand eight hundred and eighty, the said new Regulations for preventing collisions at sea, contained in the first schedule of the said recited Order in Council of the fourteenth day of August one thousand eight hundred and seventy-nine, shall, subject to the provisions of the said recited Order in Council of the twenty-fourth day of March one thousand eight hundred and eighty, apply to ships belonging to their respective countries when beyond the limits of British jurisdiction.

And whereas the said Government of Japan is desirous that Article numbered 12 of the said Regulations should as applied to Japanese ships be modified as follows, viz.: that it shall not be necessary for the fog horn, by the said Article required to be provided and used on board steam and sailing ships as a sound

signal for fog, &c., to be sounded by a bellows or other mechanical means when the same is carried on board ships belonging to Japan.

And whereas the said Government of Turkey is desirous that the said Article numbered 12 of the said Regulations shall as applied to Turkish ships be modified as follows, viz.: that, in lieu of and in substitution for the bell required by the said Article to be provided and used as a sound signal for fog, &c., there may be placed and kept on board Turkish ships an efficient drum which shall be sounded under the same circumstances and at the same intervals as by the said Article a bell is required to be rung.

Now, therefore, Her Majesty by virtue of the powers vested in Her by the said recited Act, and by and with the advice of Her Privy Council is pleased to direct:

That from and after the first day of September one thousand eight hundred and eighty the said new Regulations for preventing collisions at sea, contained in the first schedule of the said recited Order in Council of the fourteenth day of August one thousand eight hundred and seventy-nine shall subject to the provisions of the said recited Order in Council of the twenty-fourth day of March one thousand eight hundred and eighty apply to ships belonging to the following countries; that is to say,

Brazil;	Japan; and
Ecuador;	Turkey,
Hawaii;	

whether within British jurisdiction or not.

Provided however that as regards (1) Japanese and (2) Turkish ships, the Article numbered 12 of the said Regulations shall be modified as follows, viz.:

(1) It shall not be necessary for the fog horn by the said Article required to be provided and used on board steam and sailing ships as a sound signal for fog, &c., to be sounded by a bellows or other mechanical means when the same is carried on board ships belonging to Japan:

And (2) It shall not be necessary for the bell required by Article numbered 12 of the said Regulations to be provided and used on board steam and sailing ships as a sound signal

for fog, &c., to be placed and kept on board Turkish ships, but that in lieu thereof and in substitution therefor, there may be placed and kept on board such Turkish ships an efficient drum which shall be sounded under the same circumstances and at the same intervals as by the said Article a bell is required to be rung.

C. L. Peel.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

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In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

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See WILL. 3.

WILL—*Capacity—Delusions—Burden of Proof.*] A man may be capable of transacting business of a complicated and important kind, involving the exercise of considerable powers of intellect, and yet may be subject to delusions so as to be unfit to make a will.—But if the delusions under which a man labours are such that they could not reasonably be supposed to have affected the dispositions made by his will, the will would be valid.—*Banks* v. *Goodfellow* (Law Rep. 5 Q. B. 549) followed.—The burden of proving capacity to make a will rests upon those who propound the will, and, à fortiori, when it appears that the testator was subject to delusions. SMEE *v.* SMEE - - 84

2. —— *Interlineations—Attestation by Initials.*] The initials of a testatrix and the attesting witnesses in the margin of the will opposite interlineations are sufficient to render the interlineations valid. IN THE GOODS OF BLEWITT - - 116

3. —— *Revocation by Implication—Parol Evidence of Intention—Execution—Presence of Testatrix—Costs.*] If upon the face of a testamentary document and the facts known to the testatrix at the time of its execution, it is doubtful whether the testatrix intended altogether to revoke a former will, the Court will admit parol evidence to ascertain the intention.—In such a case the doubts having been caused by the condition in which the testatrix had left her testamentary papers, the Court allowed the costs of all parties out of the estate, including, besides the costs of the executors propounding the former will, the costs of legatees named in it.—A testatrix signed a document in

WILL—*continued.*
the presence of two witnessss, who twenty minutes afterwards subscribed the document in an adjoining room. The door was open, but the testatrix was not aware that they were signing:—*Held*, that the document was not duly executed. Jenner *v.* Finch - - - - - - 106

4. —— *Testatrix prevented by Force and Threats from altering it—Amendment of Pleadings.*] M. A. D., the testatrix, in 1853 made her will, by which she gave her property equally between the plaintiffs, defendants, and interveners. In an action by the plaintiffs propounding this

WILL—*continued.*
will, it appeared that in 1874 she gave instructions for another will, which would have deprived the plaintiffs of all interest in her estate.—In the course of the plaintiff's case some evidence was given tending to shew that the testatrix was prevented by force and threats from executing the proposed will.—The Court allowed the pleadings to be amended by adding statements to that effect, and praying for a declaration that the plaintiffs held their shares as trustees for the defendants and interveners. Betts *v.* Doughty [26

DIVORCE.

BIGAMY — Marriage in England — Divorce in America - - - - 163
See Marriage.

DOMICILE—Marriage in England—Divorce in America—Bigamy - - 163
See Marriage.
—— Marriage in England—Divorce in Scotland —Validity - - - - 153
See Marriage. 3.
—— Marriage of foreigners in England — Invalidity under foreign law - 94
See Marriage. 2.

INJUNCTION—Restitution of conjugal rights—Separation deed - - - 19
See Practice. 2.

JURISDICTION — *English Marriage — Foreign Husband—Stipulation for an English Residence by Wife.*] An English lady consented to marry the eldest son and heir of a Neapolitan nobleman, on condition of their always having, after marriage, a residence in England, and of their residing there six months, at least, in each year. The marriage was celebrated in August, 1854, in England. There were five English trustees of the marriage settlements, which contained a proviso that they should be construed according to the law of England. A few months after the marriage a London residence was taken and furnished by the parties, which they occupied for six months in each year, with two or three exceptions, from 1855 to 1872, living for the remainder of the year in apartments in the palace of the husband's father, at Naples, or at other places on the continent. In 1872, the lady separated from her husband in consequence of his cruelty and adultery, and she continued up to the hearing to reside in their London residence. In 1873 the husband's father died, when he succeeded to his title and estates and palace at Naples, and since then he had resided sometimes at Naples, but principally at other places on the continent. The petition and citation were served on the husband at Paris, and he had entered no appearance:—*Held*, that the Court had jurisdiction to dissolve

JURISDICTION—*continued.*
the marriage. Santo Teodoro *v.* Santo Teodoro - - - - - - 79
—— Variation of settlement — No children — Statute how far retrospective - 138
See Settlement.

LUNATIC—Petition for dissolution—Committee
See Practice. [142

MARRIAGE — *Divorce in America — Bigamy.*] Two English persons married in England. The husband afterwards went to Kansas, in the United States, and, after an interval of a year, presented a petition and obtained a divorce by reason of his wife's desertion. He then married again. The wife had received no notice of the petition:—*Held*, that his domicile at the time of the divorce was English; and that, therefore, the divorce was null and void, and he had committed bigamy.—*Quære*, whether the domicile of the wife is the domicile of the husband, so as to compel her to become subject to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicile. Briggs *v.* Briggs - 163

2. —— *Different Domiciles — Lex loci contractus.*] The validity of a marriage in England must, though the domicile of one of the parties may be foreign, be decided according to the law of England.—Marriage is based upon the contract of the parties, but is a status arising out of the contract to which each country is entitled to attach its own conditions, both as to its creation and duration.—G. B., a Portuguese, but domiciled in England, married in England I. S. a Portuguese lady, domiciled in Portugal. They were first cousins, and by the law of Portugal, are except by dispensation from the Pope, incapable of contracting marriage:—*Held*, by the English Divorce Court, that the marriage was lawful:—*Held*, also, that ignorance of the parties, as to the effects of Portuguese law upon the validity of the ceremony, could not affect the validity of the marriage. Sottomayer *v.* De Barros 94

3. —— *in England—Divorce in Scotland — Validity.*] The English Divorce Court will recognise as valid the decree of a Scotch Court

MARRIAGE—*continued.*
dissolving the marriage of domiciled Scotch persons, though the marriage was solemnized in England and the woman was English prior to her marriage.—*Semble*, in some cases the English Divorce Court might recognise as valid the decrees of a foreign court dissolving the marriages of English persons. HARVEY *v.* FARNIE - 153
—— By Englishwoman [in England — Foreign husband—Jurisdiction - - 79
See JURISDICTION.

PRACTICE — *Dissolution of Marriage—Lunatic Petitioner—Committee.*] The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage. Such a suit may be instituted by the committee of the estate of the lunatic. BAKER *v.* BAKER - - - - - 142

2. —— *Restitution of Conjugal Rights—Injunction—Stay of Proceedings.*] In a suit for restitution of conjugal rights, the respondent moved for an injunction and stay of proceedings, upon affidavit shewing that the petitioner was bound by deed not to institute such a suit:—*Held*, that such a defence must be alleged by plea, and afforded no ground for a summary dismissal of the suit.—Upon such defence being subsequently alleged by plea:—*Held*, that it was such an equitable plea as the Divorce Court since the Judicature Acts is bound to consider:—*Held*, also, that a wife is bound by a deed of separation, containing a covenant not to sue her husband for restitution of conjugal rights. Suit instituted by her in violation of such a covenant dismissed. MARSHALL *v.* MARSHALL - - - 19

RESTITUTION OF CONJUGAL RIGHTS—Separadeed—Injunction—Stay of proceedings
See PRACTICE. 2. [19

SEPARATION DEED—Injunction—Stay of proceedings - - - - 19
See PRACTICE. 2.

SETTLEMENT—*Variation—Retrospective Operation of Matrimonial Causes Act*, 1878.] An antenuptial settlement having been executed a decree nisi was afterwards obtained for dissolution of the marriage of the parties, and before the decree was made absolute the Matrimonial Causes Act, 1878, was passed, allowing the Court, notwithstanding that there are no children of the marriage, to exercise the powers vested in it by 22 & 23 Vict. c. 61, s. 5:—*Held*, that the Court had jurisdiction to vary the settlement though there was no issue of the marriage. ANSDELL *v.* ANSDELL - 138

STATUTES:
22 & 23 Vict. c. 61 - - - - 138
See SETTLEMENT.
41 & 42 Vict. c. 19 - - - - 138
See SETTLEMENT.

ECCLESIASTICAL.

FACULTY — *Mortuary — Costs.*] The rector, churchwardens, and burial board of an urban parish applied for the grant of a faculty to authorize the erection of a parochial mortuary with a post-mortem room attached, in a consecrated burial ground situate in a populous part of the parish, and closed for burials by Order in Council. The Court being of opinion that the petitioners had made out their case for the establishment of a mortuary on the site proposed, directed that a faculty should issue for the erection of the mortuary, but directed that certain conditions to be specified in the faculty should be imposed with respect to the manner of using the mortuary. BURIAL BOARD OF ST. GEORGE'S, HANOVER SQUARE *v.* HALL - - - - - 42

2. —— *Repairs of Parish Church—Status of Churchwardens of a Parish divided into Two Divisions and having a Separate Vestry for each Division.*] The parish church of St. Sepulchre is within the city of London, but the parish of St. Sepulchre is situate partly within the city of London and partly in the county of Middlesex, and five churchwardens of the parish church are annually elected, three by the vestry of the portion of the parish within the city of London and two by the vestry of the portion of the parish in the county of Middlesex. The vicar and the churchwardens elected by the city portion of the parish having petitioned the ordinary for a faculty to authorize certain repairs in the parish church, the churchwardens elected by the Middlesex portion of the parish appeared as opponents in the cause, and prayed the Court to direct the faculty, if granted, to issue to them jointly with the petitioners, and to declare what were the rights of the respective parties to the suit with respect to church management. It was admitted that the churchwardens elected by the city portion of the parish had for a long series of years had the sole control of a certain trust fund available for payment of the costs of the proposed alterations:—*Held*, that the churchwardens elected by each portion of the parish were equally officers of the ordinary in all matters relating to the management of the parish church, and that a faculty must issue to the petitioners and the opponents jointly. THE VICAR OF ST. SEPULCHRE *v.* CHURCHWARDENS of ST. SEPULCHRE - - - 64

3. —— *Reredos—Painting liable to be the Subject of Superstitious Reverence—Discretion of Ordinary*] The incumbent of a parish church applied to the ordinary for a faculty authorizing the decoration of the reredos of his parish church with a painted design, intended to represent the Adoration of Our Lord in Majesty by the Faithful, of which the following individual figures

FACULTY—*continued.*
formed a part. In the centre of the three compartments into which the reredos was divided, a figure intended to represent Our Lord seated as King. In the right hand compartment figures representing St. Lawrence and the Blessed Virgin. In the left hand compartment figures representing St. Stephen and St. John; the four last-mentioned figures being represented with their faces turned towards the centre compartment of the reredos.

FACULTY—*continued.*
The grant of the faculty was not opposed:—*Held*, that there would be danger of the representation contained in the centre compartment of the reredos being abused by receiving "superstitious reverence," in the sense explained in *Clifton* v. *Ridsdale*, 1 P. D. at pp. 352, *et seqq.*; and that, therefore, the Court ought, in its discretion, to refuse to sanction its introduction into the church. *In re* St. Lawrence, Pittington - - 131

ADMIRALTY.

APPEAL—Supreme Court—Staying] proceedings pending appeal to House of Lords
See Practice. 3. [C. A. 1

BOTTOMRY—Necessaries—Priority - 250
See Necessaries.

CASES—*Cargo ex Argos* (Law Rep. 5 P. C. 134) followed - - - - 138
See County Court.

—— *Gunnestad* v. *Price* (Law Rep. 10 Ex. 65) disapproved - - - - 138
See County Court.

—— *Simpson* v. *Blues* (Law Rep. 7 C. P. 290) disapproved - - - C. A. 138
See County Court.

—— *The Forest Queen* (Law Rep. 3 A. & E. 299) approved - - - C. A. 247
See Practice. 1.

CERTIFICATE—Suspension—Court of inquiry—appeal - - - - 123
See Practice. 2.

CHARTERPARTY — Breach — Jurisdiction of County Court - - - 138
See County Court.

—— Default in discharging cargo - - 256
See Ship.

COSTS—Action by owners of cargo—Both vessels to blame - - - 3, 221
See Practice. 7, 8.

—— Appeal—Suspension of certificate—Board of Trade - - - - 123
See Practice. 2.

—— Damage—Affidavits of owners of cargo—Reference - - - - 52
See Practice. 9.

—— Damage—Defence on merits and on ground of compulsory pilotage - - 49
See Practice. 11.

—— Limitation of liability—Claim in respect of war on security of freight - - 6
See Limitation of Liability.

—— Reference—Action of damage by owners of ship and owners of cargo - C. A. 77
See Practice 10.

—— Reference—Both ships to blame - 166
See Practice. 12.

—— Salvage—Agreement set aside as inequitable
See Practice. 17. [177

COSTS—*continued.*
—— Salvage—Two actions against same property
See Practice. 20. [5

—— Security for—Appeal from Passage Court
See Practice. 1. [C. A. 247

—— Security for—Foreign plaintiff—Wages—Caveat release - - - 121
See Practice. 19.

—— Taxation — Counsel's fees—Retainer — Refreshers - - - - 118
See Practice. 13.

CO-OWNERSHIP—Receiver—Discretion - 224
See Practice. 6.

COUNSEL'S FEES—Taxation—Costs - 118
See Practice. 13.

COUNTY COURT—*Admiralty Jurisdiction of — Breach of Charterparty—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 2.] The 2nd section of the County Courts Admiralty Jurisdiction Amendment Act, 1869, gives the county courts jurisdiction in cases of claims arising out of charterparty or other agreements for the use or hire of ships, although the Court of Admiralty may have no original jurisdiction in such cases.—*Cargo ex Argos* (Law Rep. 5 P. C. 134) followed.—*Simpson* v. *Blues* (Law Rep. 7 C. P. 290) and *Gunnestad* v. *Price* (Law Rep. 10 Ex. 65) disapproved. The Alina - - - C. A. 138

—— Jurisdiction—Towage - - - 227
See Towage.

DAMAGE—*Collision—Compulsory pilotage—Duty of Pilot on board of Ship in tow.*] Where a ship in charge of a pilot whose employment is compulsory is being towed by a steam-tug and the steam-tug without waiting for orders from the pilot suddenly adopts a wrong manœuvre, and so causes the ship to come into collision, the owners of the ship are responsible.—*Semble*, where a pilot is in charge of a ship in tow in a crowded river, it is not necessarily incumbent upon him to direct every movement of the tug. The Sinquasi 241

2. —— *Collision — Infringement of Thames Bye-laws.*] A dumb barge, by the negligent navigation of those in charge of her, was suffered to come into contact with a schooner moored to a mooring buoy in the river Thames. The schooner had her anchor hanging over her bow with the

DAMAGE—*continued.*
stock above the water, contrary to the Thames bye-laws. The anchor made a hole in the barge and caused damage to her cargo. But for the improper position of the anchor of the schooner, neither the barge nor her cargo would have received any damage:—*Held*, that the owners of the barge were not entitled to maintain an action of damage against the schooner. The Margaret [238

3. —— *Collision — Regulations for Preventing Collisions at Sea — Arts.* 12, 18 — *Sailing Vessel hove to on Port Tack.*] A sailing vessel hove to on the port tack is bound to keep out of the way of a crossing vessel under sail close hauled on the starboard tack. The Rosalie - 245

4. —— *Liability of Tug for negligent Navigation where the Vessel in tow is in charge of a Pilot by compulsion of Law—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), s. 388.] Where a steam-tug towing a vessel under a towage contract is so negligently navigated as to come into collision with a vessel belonging to third parties, the owners of the steam-tug are liable for the damage done, even if at the time of the collision the vessel in tow was in charge of a duly licensed pilot by compulsion of law whose default solely occasioned the collision. The Mary - 14

DAMAGES—Measure of—Loss of charterparty
See Practice. 14. [229

DERELICT—Salvage—Apportionment - 186
See Salvage. 2.

DRUNKENNESS—Shipmaster—Wages - 254
See Wages.

FOREIGNER — Plaintiff — Wages — Security for costs—Discretion - - - 121
See Practice. 19.

FOREIGN JUDGMENT—Action—Jurisdiction
See Jurisdiction. [28

FREIGHT—Loan on security of—Damage - 6
See Limitation of Liability.

HOUSE OF LORDS—Staying proceedings pending appeal - - - C. A. 1
See Practice. 3.

INTERROGATORIES—Relevancy—Damage 172
See Practice. 15.

JURISDICTION—*Action in rem to enforce Judgment of Foreign Tribunal of Commerce.*] The Admiralty Division has jurisdiction to entertain an action in rem to enforce a judgment obtained against a ship in a Tribunal of Commerce abroad. The City of Mecca - - - - 28

2. —— *Public Vessel—Exemption from Arrest —Trading by Public Vessel.*] As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over

JURISDICTION—*continued.*
the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory:—*Held*, therefore, reversing the decision of the Admiralty Division, that an unarmed packet belonging to the sovereign of a foreign state, and in the hands of officers commissioned by him, and employed in carrying mails, is not liable to be seized in a suit in rem to recover redress for a collision, and this immunity is not lost by reason of the packet's also carrying merchandize and passengers for hire. The Parlement Belge - - C. A. 197

—— Court of Inquiry—Suspension of certificate —Appeal - - - - 123
See Practice. 2.

LIMITATION OF LIABILITY—*Costs—Claim in respect of a Loan on Security of Freight—Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), s. 54.] Although the plaintiff in an action for limitation of liability is ordinarily liable to pay the costs of the action, yet, if the defendants raise unnecessary issues on which they fail, he is entitled to the costs of those issues, and he will not be ordered to pay the costs occasioned by a dispute between rival claimants to the proceeds in court.—The master of the ship *C.*, bound from Philadelphia to Antwerp, obtained at Philadelphia from M. a loan of money on freight upon the security of an instrument signed by him, by which it was stipulated that the loan should be repaid after arrival of the *C.* at Antwerp or other intermediate port at which the voyage should end, and that if there should be no payment of freight the loan should not be paid back.—The *C.*, whilst on the course of her voyage to Antwerp, came into collision with another ship and sank, and her cargo was lost. The collision was occasioned by the negligence of those in charge of the other ship, and her owners instituted an action for limitation of their liability. In such action a sum of money was awarded out of the proceeds paid into court to the owners of the *C.* for loss of freight. M. claimed a portion of this sum in respect of his loan:—*Held*, that his claim was well founded.—*Semble*, where in an action for limitation of liability a sum of money is awarded as compensation for loss of freight to the owners of a vessel run down by the plaintiff's ship, the holder of a bottomry bond on the freight of the vessel run down is entitled to claim, in respect of the loan on bottomry, a portion of the sum awarded for loss of freight. The Empusa 6

MORTGAGE—Right of mortgagor to charter ship
See Ship. 2. [173

NECESSARIES—*Money advanced to pay Dock Dues—Priority over Claim of Bottomry Bondholder.*] The plaintiffs, in an action of necessaries against a foreign ship, having at the request of the master advanced money to pay dock dues for the ship at the port of discharge, were held to be entitled to have the amount they had so advanced paid out of the proceeds of the ship in priority to the claim of a bottomry bondholder

NECESSARIES—*continued.*
who had advanced money on bottomry at the port of loading. The St. Lawrence - 250

PASSAGE COURT—Appeal—Security for costs *See* Practice. 1. [247

PILOTAGE—Compulsory—Ship in tow - 241
See Damage.

—— Compulsory—Vessel in tow—Liability of tug - - - - - 14
See Damage.

PRACTICE—*Appeal from Passage Court of Liverpool—Security for Costs—The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 25, 26, 27.] An appeal from an order made by the Court of Passage of the Borough of Liverpool in an Admiralty cause is subject to the same rules as an appeal from a County Court in an Admiralty cause.—Security for costs must be given before lodging the instrument of appeal, otherwise the appeal cannot be entertained.—*The Forest Queen* (Law Rep. 3 A. & E. 299) approved. The Ganges - - - - - C. A. 247

2. —— *Appeal from Suspension of Certificate by Court of Inquiry into Shipping Casualty—Jurisdiction—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 242, 432—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 23—*Shipping Casualties Investigations Act*, 1879 (42 & 43 *Vict. c.* 72), *s.* 2—*Costs of Appeal.*] Where a court of inquiry into a shipping casualty, held under the eighth part of the Merchant Shipping Act, 1854, orders the suspension of a master's certificate, in pursuance of the powers given by the 242nd section of the same Act, and the 23rd section of the Merchant Shipping Act, 1862, the Court of Appeal, having jurisdiction under the Shipping Casualties Investigations Act, 1879, will on appeal consider the evidence on which the judgment of the court of inquiry proceeded, and will reverse the judgment if the evidence is insufficient to justify the suspension of the certificate.—Where a court of inquiry ordered a master's certificate to be suspended, and the only ground on which the decision could be supported was that serious damage to a ship had been caused by the wrongful act or default of the master, within the meaning of s. 242 of the Merchant Shipping Act, 1854, sub-s. 2, and on appeal it appeared to the Court of Appeal that there was no evidence that the damage had been caused by the wrongful act or default of the master, the Court of Appeal reversed the decision, and restored to the master his certificate.—The Court below having suspended the certificate on the invitation of the Board of Trade, the Court of Appeal ordered the Board of Trade to pay the costs of the appeal. The Arizona - 123

3. —— *Appeal—Staying Proceedings pending Appeal to House of Lords—Jurisdiction of Court of Appeal—Rules of Court, Order LVIII., r.* 5.] An application to stay proceedings under an order of the Court of Appeal, pending an appeal to the House of Lords, must be made to the Court of Appeal, and not to the Division of the High Court to which the action is attached. The Khedive [C. A. 1

4. —— *Damage—Claim to Indemnity by the Owners of Defendant's Vessel against Owners of the Tug towing the Vessel—Rules of the Supreme Court, Order XVI.*] In an action of damage between two vessels, the Court has jurisdiction, under Order XVI., to determine whether or not the defendants' vessel is entitled to indemnity against a tug by which she was being towed at the time of the collision.—A collision took place between the vessels *S.* and *C.* The *C.* at the time was being towed by a tug. The owners of the *S.* instituted an action of damage against the *C.*, and alleged in their statement of claim that the collision was caused by the negligence of the *C.* and her tug, or of one of them. The owners of the *C.* obtained leave to issue a notice to the tug that they claimed to be entitled to indemnity, and the Court made an order that the owners of the tug be at liberty to appear and defend, being bound by any decision the Court might come to as to the cause of the collision.—At the hearing the owners of the tug appeared, but the defendants did not, and the Court pronounced that the *C.* was alone to blame for the collision, and that her owners were not entitled to indemnity over against the owners of the tug:—*Held*, on motion on behalf of the owners of the *C.* to rescind so much of the judgment as pronounced that the owners of the *C.* were not entitled to indemnity, that the Court had not exceeded its jurisdiction. The Cartsburn - - - - - - 35

5. ——*Claim for Indemnity—Notice to Third Party—Rules of Supreme Court, Order XVI.*] A collision took place between the ship *S.* and the *C.*, which was being towed by a tug. The owners of the *S.* brought an action against the owners of the *C.*, alleging the collision to have been occasioned by the negligence of the *C.* and her tug, or one of them. The owners of the *C.* obtained leave to serve notice on the owner of the tug that they claimed to be entitled to indemnity, and the Court made an order that the owner of the tug should be at liberty to appear and defend, "being bound as between him and the defendants by any decision the Court may come to in this action as to the cause of collision." At the hearing the owner of the tug appeared, but the defendants did not, and the Judge of the Admiralty Court pronounced that the collision was occasioned by the default of the master and crew of the *C.*, and condemned the owners in damages and costs, and declared that they were not entitled to indemnity from the owner of the tug:—*Held*, on appeal, that the order giving the owner of the tug liberty to appear and defend did not put matters in train for trying any issue between him and the defendants, and that so much of the judgment as negatived the right to indemnity by the owner of the tug must be struck out. The Cartsburn - C. A. 59

6. —— *Co-ownership—Receiver—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Discretion.*] The Court will appoint a receiver in a co-ownership suit where circumstances exist which in the opinion of the Court render such a course just and convenient. The Ampthill 224

7. —— *Damage—Action by Owners of Cargo—Both Vessels to blame—Costs.*] An action of damage was instituted, on behalf of the owners of cargo laden on board a vessel which had been

PRACTICE—*continued.*

sunk in a collision with another vessel, against such other vessel, and the Court pronounced that both vessels were to blame for the collision:—*Held*, that the defendants must be condemned in the costs of the action. [Reversed by Court of Appeal, see next case.] The City of Manchester - - - - - 3

8. —— *Damage—Action by Owners of Cargo—Both Vessels to blame—Costs.*] The owners of a cargo laden on board a vessel which had been sunk in a collision with another vessel brought an action of damage against the owners of such other vessel. The judge of the Admiralty Division pronounced that both vessels were to blame for the collision, gave the plaintiffs half their damages from the defendants, and condemned the defendants in the costs of the action. The decision that both vessels were to blame was upheld by the Court of Appeal:—*Held*, that, as the plaintiffs had failed on the issue that the vessel carrying the cargo was not to blame, no costs ought to have been given. The City of Manchester - - - - C. A. 221

9. —— *Damage—Action of Damage by Owners of Ship and Owners of Cargo—Costs of Affidavits in support of Owner's Cargo's Claim at Reference.*] In an action of damage brought by the owners of the ship *J.* and the owners of the cargo on board her against another vessel, the Court pronounced that the two vessels were both to blame for the collision, and condemned the defendants in a moiety of the damage proceeded for:—*Held*, that the owners of the cargo on board the *J.* were entitled to the costs of the affidavits brought in by them in support of their claim at the reference. The Consett [52

10. —— *Action of Damage by Owners of Ship and Owners of Cargo—Costs of Reference.*] The costs of the reference as to damages in an action of damages do not follow the costs of the action, but are in the discretion of the judge as the costs of a fresh litigation.—Where, therefore, an action had been brought by the owners of a ship and the owners of the cargo against another ship for collision, and both ships had been held to blame, and the judge afterwards gave the plaintiffs the owners of the cargo the costs of the reference, the Court of Appeal refused to interfere with his order. The Consett - - - - C. A. 77

11. —— *Damage—Defence on Merits and on Ground of Compulsory Pilotage—Costs.*] Where the defendants in a collision suit raise a defence on the merits, and also set up a plea of compulsory pilotage, and the Court dismisses the suit on the ground that the plea of compulsory pilotage is established, each party to the suit will, in accordance with the practice prevailing in the Court of Admiralty before the Judicature Acts, be left to bear his own costs. The Matthew Cay - 49

12. —— *Collision—Practice—Both Ships to blame—Costs of Reference.*] An action of damage was brought by the owners of the ship *V.* against the ship *S.*, and the owners of the *S.* claimed damages by way of counter-claim against the *V.* At the hearing of the action the Court found both ships to blame for the collision, condemned the owners of each ship in a moiety of the damage

PRACTICE—*continued.*

sustained by the other, referred the question of damages to the registrar and merchants and made no order as to costs. Afterwards the owners of the *S.* brought their counter-claim into the registry. No tender was made by the owners of the *V.*, and the registrar struck off less than one-ninth of the amount claimed, but made no recommendation as to the costs of the reference:—The Court, on the application of the owners of the *S.*, condemned the owners of the *V.* in the costs of and incident to the reference. The Savernake - 166

13. —— *Taxation of Costs—Discretion of Registrar—Counsel's Fees—Retainers—Refreshers.*] The Court will not ordinarily interfere with the taxation of costs by the registrar, unless the decision of the registrar is shewn to have been erroneous in principle.—According to the ordinary practice of the Court retainer fees for both the leading and junior counsel are allowed on taxation.—The taxing officer having disallowed refresher fees to counsel, in a case where the hearing commenced on the afternoon of one day, and was concluded at noon of the next, but the time occupied was less than one day's time, the Court refused to interfere with his discretion. The Neera 118

14. —— *Collision—Measure of Damage—Loss of Charterparty—Costs of Reference.*] The vessel *C.*, which was proceeding in ballast to Montreal to load a cargo of grain for the United Kingdom pursuant to charterparty, was injured by collision with another vessel, and compelled to put into port to repair. The repairs necessarily occupied so long a time that it was not reasonably possible for the *C.* to have arrived at Montreal in time to fulfil her charter before the navigation of the St. Lawrence was stopped by ice for the winter. In these circumstances the owners of the *C.* abandoned the charter, and it was found that they acted prudently in so doing:—*Held*, that the loss arising from the abandonment of the charter was a loss caused by the collision. The Consett 229

15. —— *Damage—Interrogatories—Rules of the Supreme Court, November, 1878, rule 3 (Order XXXI., rule 5).*] Interrogatories administered in a collision action, and relating to the circumstances of the collision, will not be struck out under rule 3 of the Rules of the Supreme Court of November, 1878, as scandalous or unreasonably or vexatiously exhibited, because the information sought to be obtained through them would for the most part be afforded by the preliminary acts. The Radnorshire - - 172

16. —— *Pleading — Wages — Set-off and Counter-claim — Loss of Ship caused by Negligence of Master—Payment by Underwriters—Amount payable on Total Loss.*] In an action of wages by master against shipowner, the defendant, by way of set-off and counter-claim, claimed damages for the loss of the ship by the negligence of the plaintiff. Reply, that the ship was insured against a total loss, and that the underwriters had paid or agreed to pay to the owners the whole amount payable by them on a total loss:—*Held*, on demurrer, that the reply was bad, because the plaintiff had not pleaded that the money had been actually paid to the defendant, or that the counter-claim had been brought

PRACTICE—*continued.*
without the authority of the underwriters. The Sir Charles Napier - - - C. A. 73

17. —— *Salvage—Agreement set aside as inequitable—Costs.*] Where, in the opinion of the Court, a salvage agreement is exorbitant, the Court will refuse to enforce it.—In a case where a master of a disabled ship at sea about 340 miles from Queenstown, requested assistance from a mail steamer, and agreed in writing to make his owners responsible to the extent of 15,000*l.*, provided the master of the mail steamer would tow the disabled ship to Queenstown, and the service was performed, the Court declined to enforce the agreement, and awarded to the salvors by way of salvage reward 7000*l.*, in addition to a sum sufficient to cover penalties which had become payable by the owners of the mail steamer by reason of the vessel deviating to perform the service. The Silesia - - - - - - 177

18. ——*Ship—Restraint—Bail for safe Return—Jurisdiction.*] The Court has jurisdiction to arrest a vessel in an action of restraint at the suit of a part owner holding a minority of shares, notwithstanding that the vessel is about to proceed on a voyage approved of by a majority of the part owners, and is being employed under a charter entered into by the ship's husband, appointed to act on behalf of all the owners. The Talca 169

19. —— *Wages—Foreign Plaintiff—Summons for Security for Costs—Caveat Release—Groundless objection to Bail—Costs and Damages.*] Where a caveat release is entered and groundless objections are taken to the sufficiency of bail, the party entering the caveat will be condemned in damages and costs.—It is in the discretion of the Court to allow the mate of a foreign vessel, though not domiciled in England, to prosecute an action for wages without giving security for costs. The Don Ricardo - - - - - 121

20. —— *Salvage—Two Actions—against the same Property—Costs.*] In a case where the defendants, in two actions of salvage instituted against the same property, were ordered to pay only one set of costs, to be apportioned between the plaintiffs in the two actions, the Court directed that the apportionment should be made according to the amounts of the plaintiffs' respective bills of costs. The Pasithea - - - - 5

PRIORITY—Bottomry bond—Necessaries 250
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SAILING RULES, Articles, 12, 18—Sailing vessel hove to on port tack - - - 245
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SALVAGE—*The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 182—*Agreement for Apportionment of Salvage.*] The 182nd section of the Merchant Shipping Act, 1854, does not prevent seamen who are entitled to recover salvage remuneration from entering into an arrangement through their solicitor for the apportionment of the amount due to them.—Where the owners of a ship have received a lump sum in respect of services rendered by their ship, master and crew, and have paid over to the crew a portion of such sum, which the crew, acting under the advice of their own solicitor, have accepted in settlement of their claims for salvage, the Court will not, where the portion so paid over is not extravagantly small, disturb the settlement in the absence of fraud or concealment. The Afrika - 192

2. —— *Derelict—Amount of Salvage Award—Apportionment.*] A derelict vessel was found in the North Atlantic Ocean, 800 miles from land, in a seriously damaged condition, and was navigated into Queenstown by salvors, who incurred great risk and hardship in rendering the service. The value of the derelict was 5100*l.* The Court awarded 2300*l.* as salvage reward. The Craigs [186

3. —— *Towage Contract—Counter-claim for negligent Towage.*] A tug under contract to tow a ship is not entitled to salvage remuneration for rescuing the ship from danger brought about by the tug's negligent performance of her towage contract.—A tug agreed to tow a ship from Liverpool to the Skerries for a fixed sum. The tug imprudently towed the ship in bad weather too near a lee shore, and, the weather becoming worse during the performance of the agreed towage service, the hawser parted and the ship was placed in a position of danger, and was compelled to let go her anchors to avoid being driven on shore. From this position she was rescued by the tug, having been compelled to slip her anchors and chains, which were lost:—*Held* (affirming the decision of the Judge of the Admiralty Court), that the tug was not entitled to claim salvage remuneration, and that her owners were liable to pay for the loss of the anchors and chains.—*Semble*, if a tug receives positive directions from the ship she is towing as to the course she is to steer, she is bound to obey them; and if the ship gets into danger in consequence of such directions the tug is not liable. The Robert Dixon [C. A. 54

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SHIP—*Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 6—*Meaning of Words, "Safe Port, or as near thereunto as she can safely get"—Rights of Parties when Ship is unable to lie afloat in Port of Discharge without being lightened.*] Where a vessel is chartered to proceed with cargo to a safe port as ordered, or as near as she can safely get, and always lie and discharge afloat, she may lawfully be ordered to discharge at a port, where she can-

SHIP—*continued.*

not by reason of her draught lie afloat without being lightened, provided she can be lightened with reasonable despatch and safety in the immediate vicinity of the port or in the port itself.—A vessel was chartered to proceed with a cargo of grain from Baltimore to Falmouth for orders, thence to a safe port in the United Kingdom as ordered, or as near as she could safely get, and always lie and discharge afloat. The vessel was ordered to Lowestoft. Her draught of water when loaded was such that she could not lie afloat in Lowestoft Harbour without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in Lowestoft Roads. The consignee offered at his own expense to lighten the vessel in the roads, but the master refused to proceed to Lowestoft to discharge, and went to Harwich as the nearest safe port, and there discharged the cargo:—*Held*, that the consignee was entitled to recover damages against the shipowner for the neglect of the master to discharge at Lowestoft. The Alhambra 256

2. —— *Mortgage—Mortgagor's right to charter Ship.*] Where a beneficial charterparty has been entered into by a mortgagor in possession of a ship the mortgagee cannot object to the charterparty being carried out simply upon the ground that the effect of carrying out the charterparty will be to remove the ship out of the jurisdiction of the Court, and to render it difficult for him to enforce his mortgage security. The Fanchon [173

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25 & 26 Vict. c. 63, s. 23 - - - 123
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31 & 32 Vict. c. 71, s. 3 - - - 138
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31 & 32 Vict. c. 71, s. 3 - - - 227
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—— —— ss. 25, 26, 27 - - - 247
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THAMES—Bye-laws—Infringement—Collision
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THIRD PARTY—Claim to indemnity—Owner of tug - - - - - 35
See Practice. 4.

—— Indemnity—Notice - - C. A. 59
See Practice. 5.

TOWAGE—*Jurisdiction of County Court having Admiralty Jurisdiction—County Courts Admiralty Jurisdiction Act*, 1868, 31 & 32 *Vict. c.* 71, *s.* 3.] A tug having entered into a contract to tow a ship from A. to B. for a specified sum, the ship, during the performance of the agreed towage, was injured by collision, and the tug was detained nearly three days in attendance on the ship. In an action of towage instituted by the owner of the tug in a county court, and transferred to this Court, this Court held that it had no jurisdiction to award, in addition to the sum agreed to be paid for towage, any remuneration for the delay. The Hjemmett - - - - - 227

—— Negligence—Counter-claim—Salvage 54
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WAGES—*and Disbursements—Habitual drunkenness of Master.*] A shipmaster who has been habitually drunk during his employment cannot maintain an action for his wages. The Macleod. [254

—— Loss of ship by negligence of master—Payment by underwriter - C. A. 73
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